No. 93-1121-CFX
Status: GRANTED

Title: Ed Plaut, et ux., et al., Petitioners
v.
Spendthrift Farm, Inc., et al.

Docketed:
January 11, 1994

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Trimble,J. Montjoy

Counsel for respondent: Ward,Richard C., Burns Jr.,James E., Colson,Guy R., Miller Jr.,Harry B., Johnson,William E., Craig,L. Clifford, Edward,David, Solicitor General, Friedman,Barry, Olson,Theodore B.

Entry	Date	Note	Proceedings and Orders
1	Jan 11 1994	G	Petition for writ of certiorari filed.
4	Feb 11 1994		Brief of respondents Gibson, Dunn & Crutcher and Francis M. Wheat in opposition filed.
5	Feb 11 1994		Brief of respondents Spendthrift Farm, Inc. in opposition filed.
2	Feb 14 1994		Brief of respondent United States filed.
3	Feb 16 1994		DISTRIBUTED. March 4, 1994 (Page 14)
6	May 23 1994		REDISTRIBUTED. May 27, 1994 (Page 14)
8	May 31 1994		REDISTRIBUTED. June 3, 1994 (Page 14)
9	Jun 6 1994		Petition GRANTED. limited to the following question: "Whether Section 27A(b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78aa-1, to the extent that it purports to require reinstatement of Section 10(b) actions dismissed with prejudice pursuant to judgments that became final prior to the enactment of Section 27A(b), contravenes the separation-of-powers doctrine or the Fifth Amendment Due Process Clause of the United States Constitution." **********
10	Jul 19 1994	G	Motion of National Association of Securities and Commercial Law Attorneys for leave to file a brief as amicus curiae filed.
11	Jul 21 1994	G	Motion of Pacific Mutual Life Insurance Co. for leave to file a brief as amicus curiae filed.
13	Jul 21 1994		Brief of petitioners Ed Plaut, et al. filed.
14	Jul 21 1994		Joint appendix filed.
15	Jul 21 1994		Brief of respondent United States filed.
19	Jul 21 1994	G	Motion of Michael B. Dashjian for leave to file a brief as amicus curiae filed.
16	Jul 28 1994	G	Motion of the Solicitor General for divided argument filed.
18	Aug 2 1994		Order extending time to file brief of respondent on the merits until September 9, 1994.
20	Sep 9 1994		Brief of respondents Spendthrift Farm, Inc., et al. filed.
21	Sep 9 1994		LODGING consisting of ten copies of the district court's unpublished order in Gilbertson v. Leasing Consultants Assocs., No. 86-1369-RE (D.Or. Feb.6, 1992.)received from counsel for the respondents.
22	Sep 9 1994	G	Motion of Washington Legal Foundation for leave to file

No. 93-1121-CFX

Entry	Date	Note	Proceedings and Orders
			a brief as amicus curiae filed.
23	Sep 26 1994		Motion of National Association of Securities and Commercial Law Attorneys for leave to file a brief as amicus curiae GRANTED.
24	Sep 26 1994		Motion of Pacific Mutual Life Insurance Co. for leave to file a brief as amicus curiae GRANTED.
25	Sep 26 1994		Motion of Michael B. Dashjian for leave to file a brief as amicus curiae GRANTED.
26	Sep 26 1994		Motion of the Solicitor General for divided argument GRANTED.
27	Sep 30 1994		CIRCULATED.
28	Oct 7 1994		SET FOR ARGUMENT WEDNESDAY, NOVEMBER 30, 1994. (2ND CASE).
29	Oct 11 1994		Motion of Washington Legal Foundation for leave to file a brief as amicus curiae GRANTED.
30	Oct 11 1994	G	Application (A94-254) to extend the time to file a reply brief from October 12, 1994 to October 26, 1994 by petitioners Ed Plaut, et ux., et al., submitted to Justice Stevens.
31	Oct 12 1994		Application (A94-254) granted by Justice Stevens extending the time to file until October 26, 1994.
32	Oct 26 1994	X	Reply brief of petitioners filed.
33	Nov 17 1994		Record filed.
		*	Original record proceedings United States District Court for the Eastern District of Kentucky (2 BOXES)
34	Nov 18 1994		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Sixth Circuit (BOX)
35	Nov 30 1994		ARGUED.

No.

In The

Supreme Court of the United States

October Term, 1993

ED PLAUT; his wife, NANCY MCHARDY PLAUT; JOHN GRADY, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

SPENDTHRIFT FARM, INC.; BATEMAN EICHLER, HILL RICHARDS, INC.; FRANCIS M. WHEAT; GIBSON, DUNN & CRUTCHER; DELOITTE, HASKINS & SELLS; NORMAN D. OWENS; AMERICAN INTERNATIONAL BLOODSTOCK AGENCY, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW*

Whether Section 27A of the Securities and Exchange Act of 1934, 15 U.S.C. § 78aa-1 is a lawful and constitutional exercise of congressional power to enact a statute of limitations governing claims arising under Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b).

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* All parties to the proceeding in the court below whose judgment is sought to be reviewed appear in the caption.

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TABLE OF CITATIONS

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No.

In The

Supreme Court of the United States

October Term, 1993

ED PLAUT; his wife, NANCY MCHARDY PLAUT; JOHN GRADY, on behalf of themselves and all others similarly situated,

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vs.

SPENDTHRIFT FARM, INC.; BATEMAN EICHLER, HILL RICHARDS, INC.; FRANCIS M. WHEAT; GIBSON, DUNN & CRUTCHER; DELOITTE, HASKINS & SELLS; NORMAN D. OWENS; AMERICAN INTERNATIONAL BLOODSTOCK AGENCY, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Ed Plaut, his wife, Nancy McHardy Plaut and John Grady, on behalf of themselves and all others similarly situated, respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported at 1 F.3d 1487 (6th Cir. 1993) and is reprinted as Appendix B at pages 3a to 30a of the Appendix. The Memorandum Opinion and Order of the United States District Court for the Eastern District of Kentucky filed on April 13, 1992 is unreported and is reprinted as Appendix C at pages 31a-39a.

STATEMENT OF JURISDICTION

(i) The Judgment of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on August 3, 1993.

(ii) The Petitions for Rehearing filed in the Sixth Circuit Court of Appeals by the Petitioners herein and the United States of America were denied by Order entered on October 14, 1993. (Appendix A at pages 1a-2a).

(iii) The statutory provision believed to confer on this Court jurisdiction to review the Judgment of the United States Court of Appeals for the Sixth Circuit is 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 27A, subsections (a) and (b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1 (Supp. III 1991), provides:

> (a) Effect on Pending Causes of Action. - The limitation period for any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction,

> including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) Effect on Dismissed Causes of Action. - Any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991 -
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

STATEMENT OF THE CASE

On November 22, 1993, Spendthrift Farm, Inc. ("Spendthrift") made a public offering of common stock and fraudulently sold 683,750 shares of the stock to approximately 2,000 persons for $7,800,000. The Petitioners herein were purchasers of Spendthrift common stock during the public offering. After the public offering on November 22, 1993, Spendthrift actively concealed the fraud by publishing a shareholders' newsletter, the "Inside Track," and by hiring a financial public relations firm to control and manipulate news and press releases and to control the dissemination of information to shareholders and the investing public so as to mislead the

shareholders and the investing public to believe that Spendthrift was prospering while suppressing all unfavorable information. In addition, Spendthrift denied shareholders' requests to review financial information made pursuant to Ky. Rev. Stat. § 271A.260.

The Petitioners herein are typical investors. Ed Plaut and his wife Nancy purchased 1,000 shares of Spendthrift stock on January 24, 1984 for $10,750. John Grady purchased 1,000 shares of Spendthrift stock on November 22, 1983 for $12,000.

After discovering the fraud committed by the Respondents herein, the Petitioners filed this suit on November 20, 1987, under Section 10(b) of the 1934 Exchange Act and Rule 10b-5 of the Securities Exchange Commission ("SEC"). When the Complaint was filed on November 20, 1987, the limitations period was clearly a three-year period which began to run when the "fraud is or should have been discovered." *Carothers v. Rice,* 633 F.2d 7 (6th Cir. 1980); *Herm v. Stafford,* 663 F.2d 669 (6th Cir. 1981). The Petitioners relied on the well-known and well-established limitation period prescribed in *Carothers* and *Herm.*

This action was still pending on June 20, 1991 when this Court issued its decisions in *Lamph, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. __, 111 S. Ct. 2773 (1991); and *James B. Beam Distilling Co. v. Georgia,* 501 U.S. __, 111 S. Ct. 2439 (1991). *Lamph* overruled prior authority to the contrary and held that Section 9(e) of the 1934 Exchange Act was the uniform federal statute of limitations for private actions brought under Section 10(b) of the 1934 Exchange Act and Rule 10b-5. Section 9(e) provides for a one-year/three-year limitation period, *i.e.,* suit must be brought within one year after the violation is discovered but, in any event, not later than three years after the violation occurs, thus creating an absolute three-year statute of repose.

The District Court, relying on *McCullough v. Virginia,* 172

U.S. 102 (1898) and its progeny, held that *Beam* required retroactive application of *Lamph,* requiring the dismissal with prejudice of the federal securities claims in this action. The order of the District Court dismissing this action was entered on April 13, 1991. The Petitioners did not appeal the District Court's order of dismissal because such an appeal would have been clearly frivolous and a clear violation of and sanctionable under Fed. R. Civ. P. 11.

The *Lamph* decision "changed the rules in the middle of the game for thousands of fraud victims who already had suits pending. (Remark of Senator Richard Bryan, 137 Cong. Rec. S18623, Daily Ed. November 27, 1991). Thus, on November 27, 1991, Congress adopted the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2387 (1991) (the "Act"). Section 476 of the Act added Section 27A to the 1934 Exchange Act and, in particular, Section 27A(b) which is at the heart of the instant case, to-wit:

> (b) Effect on Dismissed Causes of Action. - Any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991 -
>
> > (1) which was dismissed as time barred subsequent to June 19, 1991, and
> >
> > (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff

not later than 60 days after the date of enactment of this section.

On February 11, 1992, Petitioners timely filed their motion to reinstate their claims pursuant to Section 27A(b). The District Court determined that the Petitioners met the statutory requirements to reinstate their 10b-5 causes of action pursuant to Section 27A(b) but held the statute unconstitutional and denied Petitioners' motion to reinstate. The case was appealed to the United States Court of Appeals for the Sixth Circuit which affirmed the District Court and held both Section 27(a) and Section 27(b) unconstitutional.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The basis of federal jurisdiction in the United States District Court for the Eastern District of Kentucky is 28 U.S.C. § 1331; 15 U.S.C. § 77b; 15 U.S.C. § 78c; 15 U.S.C. § 78j(b); and C.F.R. § 240.10b-5.

REASONS FOR GRANTING WRIT

I.

THE DECISION BELOW HOLDING SECTION 27A(a) OF THE SECURITIES EXCHANGE ACT OF 1934 (15 U.S.C. § 78AA-1) UNCONSTITUTIONAL CONFLICTS WITH THE DECISIONS OF THE UNITED STATES COURTS OF APPEAL FOR THE FIRST, SECOND, FOURTH, FIFTH, SEVENTH, NINTH, TENTH AND ELEVENTH CIRCUITS, ALL HOLDING SECTION 27A(a) A CONSTITUTIONAL EXERCISE OF CONGRESSIONAL POWER TO ENACT A STATUTE OF LIMITATIONS GOVERNING CLAIMS ARISING UNDER SECTION 10(b) OF THE EXCHANGE ACT 15 U.S.C. § 78j(b). THE DECISION OF THE COURT BELOW HOLDING SECTION 27A(b) OF THE EXCHANGE ACT UNCONSTITUTIONAL CONFLICTS WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT BUT IS IN ACCORD WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

As of the date of the writing of this Petition, the nine of the eleven Circuits that have addressed the constitutic nality of Section 27A(a), that is, the First, Second, Fourth, Fifth, Seventh, Ninth, Tenth and Eleventh, have all held Section 27A(a) to be a lawful and constitutional exercise of congressional power to enact a statute of limitations governing claims arising under Section 10(b) of the 1934 Exchange Act. *Cooperativa de Ahorro y Credito Aquada v. Kidder, Peabody & Co.*, 993 F.2d 269 (lst Cir. 1993); *Axel Johnson v. Arthur Andersen*, 6 F.3d 78 (2d Cir. 1993); *Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256 (4th Cir. 1993); *TGX Corp. v. Simmons*, 997 F.2d 39 (5th Cir. 1993); *Berning v. A.G. Edwards & Sons, Inc.*, 990 F.2d 272 (7th Cir. 1993); *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993); *Anixter v. Home-Stake Production, Co.*, 977 F.2d 1533 (10th Cir. 1993), *cert.*

denied, 113 S. Ct. 1841 (1993); *Henderson v. Scientific-Atlanta,* 971 F.2d 1567 (llth Cir. 1992).

Apparently, only three Circuits have addressed the constitutionality of Section 27A(b). One Circuit, the Fifth, in *TGX Corp. v. Simmons, sub nom., Pacific Mutual Life Insurance Co. v. First Republic Bank Corp.,* 997 F.2d 39 (5th Cir. 1993) held 27A(b) constitutional. Two Circuits, the Sixth and Tenth, have held Section 27A(b) unconstitutional; the Sixth Circuit in the instant case, *Plaut v. Spendthrift Farm, Inc.,* 1 F.3d 1487 (6th Cir. 1993) and the Tenth in *Johnston v. Cigna Corp.,* __ F.3d __, 1993 WL 500842 (10th Cir. December 7, 1993). For this reason and this reason alone, this Court should issue its writ of certiorari to resolve the conflict between the Circuits.

Furthermore, this conflict between the Circuits regarding the constitutionality of Sections 27A(a) and 27A(b) is of great importance to not only the Petitioners in the instant case but to defrauded investors everywhere. In the instant case, over 2,000 investors were defrauded of $7,800,000 which, with interest at say 6% per annum from November 1993, equals $12,948,000 today. This case clearly illustrates the truth of the adage "Justice delayed is justice denied." When Congress was considering the passage of Section 27A in November of 1991, it was estimated, based on known statistics then available, that plaintiffs' cases involving in excess of $5,000,000,000 and hundreds of thousands of investors had been either dismissed on the basis of the *Lamph* decision or motions were pending to dismiss. Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce of the House of Representatives at pp. 3-6, November 21, 1991.

II.

THE DECISION BELOW STRIKES DOWN AN ACT OF CONGRESS AS UNCONSTITUTIONAL AND THUS DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THE SUPREME COURT.

Any case in which any court decides that an Act of Congress is unconstitutional is, by its very nature, an exceptionally important question of federal law which should be decided and settled by the Supreme Court. This is particularly true when, as here, some 2,000 investors have lost approximately $12,948,000 and thousands of investors nationwide have lost in excess of a minimum of $5,000,000,000.

The issue in this case becomes even more significant because it involves the authority of Congress to protect the reasonable expectations of plaintiffs in security fraud actions who relied on the long-established statutes of limitations in their own Circuits only to have the rug pulled out from under them by this Supreme Court and have their suits dismissed after this Supreme Court implicitly overruled a number of long and well-established precedents on the limitations issue, including *Carothers v. Rice, op. cit. supra,* and *Herm v. Stafford, op. cit. supra.*

III.

THE COURT BELOW DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THE SUPREME COURT.

The court below in deciding this case relied primarily on *Hayburn's Case,* 2 U.S. (2 Dall.) 409 (1792) and *McCullough v. Virginia,* 172 U.S. 102 (1898). By applying *Hayburn's Case* and

McCullough, the court below misapprehended the law. In *Hayburn's Case*, the reason the congressional act was deemed unconstitutional was that what Congress directed the Circuit Courts to do was "not of a judicial nature." I Warren, *The Supreme Court in United States History 1789-1835*, pp. 70-71. This is not the case here. What Section 27A directs the courts to do here is of a judicial nature, that is, determine whether suits such as the instant case were timely filed under pre-*Lamph* law and, if so, reinstate those cases so that there can be a *judgment on the merits*.

The holding in *McCullough*, which was cited by the lower court as an expression of the vested rights doctrine, was not based on the vested rights doctrine at all. In fact, the judgment in *McCullough*, which the Supreme Court held could not be disturbed by a subsequent enactment of the legislature, was actually on appeal at the time and was thus not "final" at the time the legislation in question was enacted by the Virginia Legislature. Thus, viewed solely in a procedural light, the holding in *McCullough* is actually contrary to the well-settled rule that an appellate court reviewing a judgment must apply the law in effect at the time it renders its decision. *See United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). Furthermore, the decision in *McCullough* must be viewed in light of its unique circumstances. The statute at issue in *McCullough* was the last in a series of enactments of the Virginia Legislature intended to extinguish the right conferred on the state's coupon bond holders by the act pursuant to which the coupon bonds had been issued to persons to use their coupon bonds to pay taxes. Thus, the statute at issue in *McCullough* was unconstitutional, not because it violated the constitutional principles of due process and separation of powers which are embodied in the vested-rights doctrine, but, rather, because it impermissibly impaired the contract rights of the coupon bond holders in violation of Article 1, § 10 of the Constitution.

Furthermore, the Supreme Court has never applied the so-called vested-rights doctrine to decide another case. *See* discussion in *TGX Corp. v. Simmons*, 997 F.2d 39, at pp. 45-55 (5th Cir. 1993) and dissent of Holloway, J. in *Johnston v. Cigna Corp.*, 1993 WL 500842 at pp. 12-17.

CONCLUSION

For the reasons stated hereinabove, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING APPELLANTS' PETITION FOR REHEARING FILED OCTOBER 14, 1993

No. 92-5591

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ED PLAUT, HIS WIFE, ET AL.,

Plaintiffs-Appellants,

v.

SPENDTHRIFT FARM, INC., ET AL.,

Defendants-Appellees.

ORDER

BEFORE: KEITH and BATCHELDER, Circuit Judges; and CHURCHILL,* District Judge.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petitions for rehearing have been referred to the original hearing panel.

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* Hon. James P. Churchill, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix A

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 3, 1993

No. 92-5591

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ED PLAUT; his wife, NANCY McHARDY PLAUT; JOHN GRADY, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,

v.

SPENDTHRIFT FARM, INC.; BATEMAN EICHLER, HILL RICHARDS, INC.; FRANCIS M. WHEAT; GIBSON, DUNN & CRUTCHER; DELOITTE, HASKINS & SELLS; NORMAN D. OWENS; AMERICAN INTERNATIONAL BLOODSTOCK AGENCY, INC.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Kentucky

---

Decided and Filed August 3, 1993

Appendix B

Before: KEITH and BATCHELDER, Circuit Judges; and CHURCHILL, Senior District Judge.*

BATCHELDER, Circuit Judge, delivered the opinion of the court, in which CHURCHILL, Senior District Judge, joined. KEITH, Circuit Judge (pp. 26-28), delivered a separate opinion concurring in part and dissenting in part.

ALICE M. BATCHELDER, Circuit Judge.

I.

Appellants, the plaintiffs before the District Court, representing a large number of sometime investors, originally sued defendants on November 25, 1987, alleging violations of the securities laws, namely fraud and deceit in the sale of stock under Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act")[1] and Securities and Exchange Commission Rule 10b-5.[2] Defendants owned "one of the Commonwealth's premier thoroughbred horse farms" (the District Court's characterization, to which we owe every deference) and issued stock in the enterprise in order to raise some thirty million dollars in cash; others of the named defendants were various legal and financial advisers to the venture. The appellants (or "shareholders") originally purchased their stock when defendants offered it for public sale in 1983.

For over three years, the pretrial litigation in the District Court proceeded apace. On June 20, 1991, however, the Supreme Court handed down *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S. Ct. 2773 (1991), which applied a uniform Federal time limit

*The Honorable James P. Churchill, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

[1] 15 U.S.C. § 78j.

[2] 17 C.F.R. § 240.10b-5.

Appendix B

from another section of the 1934 Act to that action and all private § 10(b) actions. *Lampf* provided a three year period of repose, running from the date of a fraudulent securities contract of sale, or a one year limitation period, running from the date of discovery of the fraud.[3]

The District Court, applying *Lampf* retroactively on the authority of *Beam Distilling Corp. v. Georgia*, 111 S. Ct. 2439 (1991), which was announced the same day as *Lampf*, dismissed the shareholders' claims with prejudice on August 13, 1991. The shareholders did not file what they believed (correctly) would have been a meritless and indeed sanctionable appeal.

In November 1991, Congress passed the FDIC Improvement Act of 1991, ("1991 Act") which, on a plaintiff's motion made within sixty days of the effective date of the statute, December 19, 1991, required the District Courts to reinstate claims which had been dismissed as a result of the application of the Federal statute of limitations announced in *Lampf*. The shareholders filed such a motion on February 11, 1992. While finding that under the statute the shareholders were entitled to have their claims reinstated, the District Court held the statute unconstitutional as applied and denied the motion. Since the portion of the 1991 Act which commands the District Court to reinstate the shareholders' dismissed cause of action violates the doctrine of separation of powers and deprives the defendants of their vested rights in the court's final judgment, we affirm.

II.

The disputed statutory provision of the 1991 Act provides:

[3] Prior to *Lampf*, the Kentucky Blue Sky law provided a three year limitation period for this type of Federal securities action, running from the date of discovery. Ky. Rev. Stat. Ann. § 292.480. Two Circuits had already adopted the Federal one year/three year period adopted in *Lampf*; others had applied State limitations periods. *See Lampf*, 111 S. Ct. at 2777 n.1 (citing cases).

(b) **Effect on dismissed causes of action**

Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991

(1) which was dismissed as time barred subsequent to June 19, 1991,[4] and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such law existed on June 19, 1991,

shall be reinstated on motion by the plaintiff not later than 60 days after Dec. 19, 1991.

15 U.S.C. § 78aa-1.[5] The statute's language is plain and unambiguous. It applies only to the claims of the parties in *Lampf* and to those lawsuits which were dismissed as a result of *Lampf*'s retroactive application. The statute commands the Federal courts to reinstate cases which those courts have dismissed. Where the word "shall" appears in a statutory directive, "Congress could not have chosen stronger words to express its intent that [the specified action] be mandatory. . . ." *United States v. Monsanto*, 491 U.S. 600, 109 S. Ct. 2657, 2662 (1989).

Refreshingly, none of the litigants at our bar has suggested that § 27A means anything other than what it plainly says. This is certainly not a case in which the issue of separation of powers

[4]The Supreme Court announced its decision in *Lampf* on June 20, 1991.

[5]Also known as "Section 27A." Subsection (a) of this provision retroactively applies the previously applicable statute of limitations to those cases filed before June 19, 1991 which remained pending in the courts. The parties do not dispute this subsection; we therefore do not address it.

> comes before the [c]ourt clad, so to speak, in sheep's clothing: [where] the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis.

Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). If Justice Scalia, the lone dissenter in *Morrison*, thought that the challenged independent counsel law was a wolf which came "as a wolf," *id.*, we think that § 27A comes as a camel, one that has forcibly and quite unapologetically thrust its nose into the tent of the judicial branch.

A. *A brief historical background.*

To answer the question upon which the constitutionality of § 27A hinges, we must reach far back into American legal history. During the first century or so of colonial government, legislative edicts requiring courts to reopen, vacate, rehear, or even reverse settled decisions upon the petition of the aggrieved losing party were not uncommon.[6] Noting the apparent prevalence of legislative adjudication of private disputes and grievances in the early colonial period, historians have concluded that such action did not offend the legal or political sensibilities of the time.[7] However, these sensibilities changed considerably during the years following the outbreak of the Revolutionary War, particularly with the escalation of legislative interference in private disputes which occurred during the time of the Articles of

[6]*See* Gordon S. Wood, *Creation of the American Republic* 154-55 (1969); *Judicial Action by the Provincial Legislature of Massachusetts*, 15 Harv. L. Rev. 208 (1901-02).

[7]*See*, for example, *Creation*, *supra* note 6 at 154 ("[T]he assemblies in the eighteenth century still saw themselves . . . as a kind of medieval court making private judgments as well as public law . . . . Such assumptions of traditional gubernatorial and judicial authority . . . did not seem to be usurpations . . . ."); *see also* E.S. Corwin, 1 *Corwin on the Constitution* 59-60 (1981).

Confederation, notably and most frequently to grant debtors "relief" from creditors.[8] "Once legislative interference in judicial matters had intensified as never before in the eighteenth century, a new appreciation of the role of the judiciary in American politics [began] to emerge." *Id.* at 454.

The transformation of the legislature from its occasional role as an informal court of last resort, dishing out equitable relief to particularly aggrieved citizens, to a "department [which] is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex," as James Madison described the legislative element of government in *The Federalist 48*, deeply concerned the fledgling Nation's leaders, most notably those who met in Philadelphia in 1787 to revise the Articles of Confederation. Their concern translated into many of the Constitution's specific enumerations of and limitations on power, as well as the "political truth" embodied in the document that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny" and that "the preservation of liberty requires that the three great departments of power should be separate and distinct." *The Federalist 47* (James Madison).

---

[8]Wood, *supra* note 6 at 404-07, 454. As an example, Professor Wood describes the problem which persisted in Vermont at this time:

> The legislature, charged the Vermont Council of Censors, was reaching for "uncontrolled dominion" in the administration of justice: becoming a court of chancery in all cases over £4,000, interfering in causes between parties, reversing court judgments, staying executions after judgments, and even prohibiting court actions involving bonds or debts, consequently stopping nine-tenths of all causes in the state. In their assumption of judicial power the legislators had determined every cause, said the Council, guided by no rules of law but only by their crude notions of equity, "or in other words, according to their sovereign will and pleasure."

Id. at 407 (quoting *Address of the Council of Censors, Feb. 14, 1786,* in Slade, ed., *Vermont State Papers* at 537).

Defending the Constitution against charges that its provisions did not ensure adequate separation among the branches, Madison explained that good government did not require its departments to be "totally separate and distinct from one another." The nature of the power exerted, not the person or body exerting it, mattered: "[W]here the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted." *Federalist 47.* In the specific context of the separation between legislature and judiciary, he noted, "[t]he entire legislature can perform no judiciary act"; pursuing the point, he quoted Montesquieu: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator.*" *Id.*

In illustrating the dangers of the "encroaching spirit of power," Madison emphasized the dynamic counterbalancing the Constitution envisioned among the branches of government, which he immortalized concisely in declaring that "[a]mbition must be made to counteract ambition." *Federalist 48, 50.* He cited first the example of Virginia, where that Commonwealth's constitution prescribed the separation of powers, but where Jefferson had complained that "no barrier was provided between these several powers." *Federalist 48* (quoting Thomas Jefferson, *Notes on the State of Virginia* (1784)). Madison noted that Jefferson had observed, with concern, that the Virginia legislature had "*in many* instances, *decided rights* which should have been left to *judiciary controversy* . . . ." *Id.* Madison pointed out the same dangerous trend in Pennsylvania, where "the [State] Constitution had been flagrantly violated by the legislature in a variety of important instances," including where "cases belonging to the judiciary department [had been] frequently drawn within legislative cognizance and determination." *Id.* "The conclusion," Madison summarized,

> which I am warranted in drawing from these observations is that a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.

Id.

B. *The Separation of Powers Applied and Enforced.*

After the States ratified the Constitution, it did not take long for fears of legislative encroachment on the judiciary's sphere of action to be realized. In 1791, Congress enacted a scheme by which disabled Revolutionary War veterans could apply for pensions. Veterans were to make application to the Federal Circuit Courts, which would then accept (or reject) their assertions that they were actually veterans, and render judgment as to the amount of pension appropriate to their disabilities. However, Congress gave the Secretary of War the final say; he could deny pensions where he suspected "imposition or mistake." *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), as described in 13 Charles A. Wright et al., *Federal Practice and Procedure* § 3529.1 at 302 (1984).

At that time, the Justices of the Supreme Court "rode circuit" and comprised the Federal Circuit Courts, sitting with District Court judges. The (then) five Justices of the Supreme Court were confronted with the pension act while sitting with three District Court judges on separate Circuit Court panels convened in New York, Pennsylvania, and North Carolina. Each panel independently and unanimously declined to hear the veterans' petitions, reasoning that for the courts to render judgments subject to review by the Congress was violative

of the separation of powers.[9] This result was in essence the Court's first invalidation of an act of Congress. No doubt recognizing the gravity of this situation, both the Pennsylvania and North Carolina panels sent letters, jointly authored by the sitting judges, to President Washington informing him directly of their respective decisions and explaining the reasoning behind their objections.[10]

The Justices sitting in New York noted

> [t]hat by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either. . . . [The Act] subjects the decisions of these courts, made pursuant to those [judicial] duties, first to the consideration and suspension of the secretary of war, and then to the revision of the Legislature; whereas, by the constitution, neither the secretary of war, nor any other executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.

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[9]The U.S. Attorney General then brought a motion for a writ of mandamus before the Supreme Court at its next term, which the Court denied since the motion was made *ex officio* rather than on behalf of an actual petitioner. Unfazed, the Attorney General subsequently brought another motion for a writ of mandamus, this time on behalf of a particular applicant, William Hayburn, and asked the Supreme Court to order the courts to entertain the veterans' applications. The Court issued an opinion declaring that it would hold the motion under advisement until the next term; by that time, however, Congress had enacted an alternative system for providing the pensions. *See Hayburn's Case*, 2 U.S. 409.

[10]These letters, along with the opinion of the New York circuit panel, were published as a note to the Supreme Court's opinion issued in response to the Attorney General's second mandamus motion. While the Court did not specifically pass on the constitutionality of the act, as explained in note 9, the opinions rendered in *Hayburn's Case* "have since been taken to reflect a proper understanding of the role of the Judiciary under the Constitution." *Morrison v. Olson*, 487 U.S. 654, 677 n.15 (1988).

Hayburn's Case, 2 U.S. at 409-10 n.2.

Similarly, the Justices sitting in Pennsylvania went straight to the heart of the matter. They noted that "the people of the United States have vested in Congress all legislative powers granted in the constitution" and have vested in the courts "the judicial power of the United States." *Hayburn's Case*, 2 U.S. at 410 n.2.

> It is a principle important to freedom, that in government, the judicial should be distinct from, and independent of, the legislative department. . . . [The people] have placed their judicial power not in Congress, but in "courts."

Id. Holding that the Act required judges to carry out "business . . . not of a judicial nature," the Justices went on to explain how the Act, if executed as Congress prescribed, offended the separation of powers:

> [I]f . . . the court had proceeded, its judgments (for its opinions are its judgments) might, under the same act, have been revised and controled by the legislature, and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts; and, consequently, with that important principle which is so strictly observed by the constitution of the United States.

Id. The North Carolina court echoed this interpretation:

> [N]o decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the constitution, be liable to a reversion, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested. . . .

Id. With this unprecedented, "painful" ruling, the Justices, some of whom had been at the Philadelphia Convention, made it clear that the Federal judiciary power, while defined in its reach by the Congress, could not be exercised by that body. The Court anchored its holding in the Constitution's succinct sentences vesting the legislative and judicial powers in their respective branches, and, necessarily, in the historical and theoretical understanding of the nature of the judicial power which had been incorporated into the Constitution.

III.

We have devoted several pages to *Hayburn's Case* and the background of the constitutional separation between the legislature and the judiciary, not to kill trees, but to illustrate that the Supreme Court has from the beginning maintained the rule that Congress may not retroactively disturb final judgments of the Federal courts, and to explain the Court's adherence to that rule as a protection of the separation of powers. We search in vain for an instance where the courts have permitted Congress retroactively to disturb final judgments rendered in cases between private litigants.[11] If the statute which gave rise

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[11] Excepting, of course, the various courts which have found § 27A constitutional. *See, e.g., TGX Corp. v. Simmons*, No. 92-3375, 1993 U.S. App. LEXIS 18359 (5th Cir. July 20, 1993); *Cooke v. Manufactured Homes, Inc.*, No. 93-1005, 1993 U.S. App. LEXIS 17167 (4th Cir. July 9, 1993); *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir. 1993); *Berning v. A.G. Edward & Sons, Inc.*, 990 F.2d 272 (7th Cir. 1993); *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993); *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1841 (1993); *Henderson v. Scientific-Atlanta*, 971 F.2d 1567 (11th Cir. 1992), *petition for cert. filed*, June 25, 1993. Insofar as these courts have specifically addressed § 27A(b) rather than placing a blanket imprimatur on § 27A in its entirety, these opinions generally reflect the view that in enacting subsection (b), Congress simply acted within its powers to "change the underlying law" and apply the change retrospectively. We strongly disagree with the rationale behind these decisions, but we will refrain from critiquing each of them point by point; we believe our reasoning speaks for itself. Of course, we are also well aware of the multitude of District Court opinions on the subject.

to *Hayburn's Case* violated the Constitution, then § 27A(b) cannot stand, *a fortiori*. Reserving to Congress the power to "suspen[d]" and "revis[e]" decisions of the Supreme Court which had interpreted and applied valid Federal law would enable the Congress to sit as a "court of errors." In enacting § 27A, Congress has not simply reserved such power, as in *Hayburn's Case*, but actually exercised it. Since we cannot say that the fundamental natures of the legislative and judicial powers have somehow changed since 1792, we cannot square § 27A(b) with *Hayburn's Case*. The dangers to judicial independence in a system of separate powers remain; we are no more willing to ratify a legislative usurpation of the judicial power today than the Court was in 1792.[12]

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[12] *See also McCullough v. Commonwealth of Virginia*, 172 U.S. 102 (1898), in which the Court reviewed a Virginia statute which effectively nullified bonds issued by the Commonwealth. State and Federal courts had previously adjudged the bonds to be fully negotiable. The Court held, among other things, that

> [i]t is not within the power of a legislature to take away rights which have been once vested by judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

McCullough, 172 U.S. at 123-24. The Government asserts that *McCullough*, which the District Court cited in holding § 27A(b) to be unconstitutional, was the only occasion where the Supreme Court held a statute unconstitutional under the "vested rights doctrine." Even if this be the case, we confess ignorance of the rule implied in the Government's argument that a single, unreversed decision of the Supreme Court is not binding on the District Court, or on us. We do not base our decision primarily on this so-called "vested rights doctrine," despite its prominent separation of powers component, because the asserted ability of Congress to disturb rendered final judgments does not hinge on the nature of the judgment and its property value to the prevailing litigant, a central rationale of the vested rights doctrine. However, we note that *McCullough* remains good law, including the holding quoted above, even if the Supreme Court has not ruled on a similar case since. *See Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805, 810 (11th Cir. 1988); *Daylo v. Administrator of Veterans' Affairs*, 501 F.2d 811, 816 (D.C. Cir. 1974).

The shareholders cite several cases they believe illustrate exceptions to this longstanding rule. They argue, in essence, that because Congress has the power in certain circumstances to affect the application or effect of judicial actions, this power necessarily extends to all judgments, including the final judgments of the Federal courts.[13] Intervening on behalf of the shareholders, the United States argues that in fact no such rule has survived at all. However, we believe the rule to be not only alive but vital to the continuing integrity of the independent Federal judiciary; further, we believe no true exceptions to the rule exist. Not only is each case cited by shareholders and the Government distinguishable, but the Supreme Court has taken great pains to reinforce the final judgment rule in every instance where it has been invoked.

The Government completely mischaracterizes the cases it cites in support of its argument that "the Supreme Court has explicitly upheld a wide range of federal and state statutes that have divested litigants of final judgments." For example, the Government cites *Pennsylvania v. Wheeling and Belmont Bridge Co.* (the *Wheeling Bridge Case*), 59 U.S. (18 How.) 421 (1856), which involved a bridge that defendants had built at the behest of the Commonwealth of Virginia spanning the Ohio River. In an earlier action, Pennsylvania had succeeded in getting

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[13] As proof that no judgments are truly "final," shareholders and the Government point to Fed. R. Civ. P. 60(b), which allows a court the discretion to "relieve a party . . . from [a] final judgment" it has previously rendered, on motion from a party, where any or all of a number of factors, such as mistake, fraud, or new evidence, show that the original judgment was somehow tainted or unfair. This argument completely misses the crucial point that Rule 60(b) in no way threatens judicial autonomy or implicates the separation of powers. The question is not whether *the courts* may disturb final judgments, but whether *Congress* may disturb them. *See Treiber v. Katz*, 796 F. Supp. 1054, 1062 n.7 (E.D. Mich. 1992) ("[T]he Court's authority to set aside its own final judgment . . . is profoundly different from a legislative decree requiring courts to set aside final judgments."). To put this irresponsible argument in proper perspective, surely the Government would not argue that just because the Supreme Court can nullify legislation by declaring it to be violative of the Constitution, so can the President.

the Supreme Court to declare the bridge an "obstruction of the free navigation of the . . . river" which harmed commerce in Pennsylvania; the Court granted injunctive relief requiring that the bridge be torn down or rebuilt with sufficient height to permit riverboat traffic. *Id.* at 429. The Court also awarded costs to the plaintiff. *Id.* In response, an act of Congress was passed declaring the bridge to be a "lawful structure," declaring the bridge and the roads it connected to be a Federal post road, and requiring riverboat operators not to interfere with the construction or operation of the bridge. *Id.* Pennsylvania nonetheless moved the Court to enjoin the rebuilding of the bridge (which a storm had since destroyed), arguing both that the new act of Congress was inconsistent with the free navigation of the river which Congress had guaranteed by previous enactment, *id.* at 430, and that the new act of Congress could not have the effect and operation of annulling the prior judgment of the Court, *id.* at 431.

Congress has the power "to regulate the navigation of the river," the Court noted; it similarly has the power "to regulate commerce among the several States." *Wheeling Bridge*, 59 U.S. at 430, 431. Since Congress ultimately controls both these powers, its retroactive legalization of the bridge "modifies" its previous enactments ensuring free navigation; "although it still may be an obstruction in fact, [it] is not so in contemplation of law." *Id.* at 430. Thus, Pennsylvania's injunctive relief, which entitled it to demand that the builders alter or destroy the bridge as necessary to preserve Congress's mandate that there be unhindered navigation of the Ohio River, had no force once Congress had redefined the river's navigability to include the presence of the bridge.

Since injunctive relief necessarily depends on a continuing affront to one's legal rights, while legal relief depends only on a judicial determination that one's legal rights have been violated with resulting cognizable damage to the claimant, Congress could permissibly change the law so as to deprive a party of its right to

injunctive relief. However, the *Wheeling Bridge Case* does not, as the Government would have us believe, therefore hold that Congress may act to deprive *all* parties of final judgments rendered in their favor. The *Wheeling Bridge* Court not only recognized but stressed this distinction, and took the opportunity to restate, in the strongest terms, the general rule against legislative modification of settled judgments:

> But it is urged that the Act of Congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff. This, as a general proposition, is certainly not to be denied, especially, as it respects adjudication upon the private rights of parties. When they have passed into judgment, the right becomes absolute, and it is the duty of the court to enforce it. . . .
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> . . . .
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> . . . [I]f the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of Congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court.

Wheeling Bridge, 59 U.S. at 431.

In other words, had Pennsylvania claimed that it had lost, say, a million dollars in tax revenues as a result of the obstruction, and had the Court affirmed a judgment against the bridge company in that amount prior to the Congress's taking any further action, Congress could not permissibly enact a bill which vacated, reversed, or otherwise disturbed that money judgment. Indeed, the Court noted that the costs it had granted Pennsylvania "st[ood] upon the same principles" and were not affected by the subsequent legislation. *Id.* The "judgment of the

court" results from the court's exercise of judicial power to apply the law in existence at the time of judgment to the facts presented, and to reassign property rights as necessary to satisfy the law. Disputed property rights, such as claims for damages, thus become settled, and are entitled to the judiciary's protection and enforcement.

The continuing vitality of the rule against disturbing final judgments notwithstanding, shareholders and the Government nonetheless attempt in the alternative to distinguish the present case, arguing that a judgment rendered in favor of defendants on the basis of a time bar does not have the same finality as a judgment rendered "on the merits." We do not question the traditional legislative power to amend, repeal, or even extend statutory time limits. Where Congress changes or supersedes such time limits, no litigant can properly assert a continuing or vested "right" to the old time limit. *See United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801); *Campbell v. Holt*, 115 U.S. 620 (1885); *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). However, we reject the Government's argument, based on Congress's power to amend statutes of limitation, that "[a] *judgment* resting on a statute of limitations is no more 'fundamental,' and no more immune from legislative revision, than the statute of limitations itself." Perhaps vaguely aware of the enormous consequences which would result to our system of government were the Congress's undisputed power to change the existing laws extended to allow it retroactively to change the prior *application* of those laws by the courts, the Government attempts to limit its argument to "technical, non-substantive" laws such as statutes of limitation and repose.

To repeat, we fail to identify a single case (besides the ones holding § 27A to be constitutional) which has held that the decision of a Federal court adjudging a claim to be time-barred is not a final judgment. Again, the cases cited by appellant and the Government hold only that statutes of limitation are "arbitrary enactments by the law-

making power," "good only by legislative grace" and may be changed by Congress and applied retroactively to pending cases. *Campbell*, 115 U.S. at 628; *Chase Securities*, 325 U.S. at 314. In *Chase Securities*, for example, the Court noted that the Minnesota courts (whence the appeal arose) had not finally determined whether the plaintiff's case was time-barred, thus the case was

> not one where a defendant's statutory immunity from suit had been fully adjudged so that legislative action deprived it of a final judgment in its favor.

Chase Securities, 325 U.S. at 310. While the *Chase Securities* decision's description of the legislature's power to change statutes of limitations retroactively is indeed sweeping, this language conclusively shows both that the Court believed dismissals of time-barred claims to be "final judgments" and that the Court did not view this legislative power as extending to require that courts substitute a new limitation period in cases finally decided under a previously applicable one. *See also Campbell*, 115 U.S. at 628 ("[S]tatutes, shortening the [limitation] period or making it longer, which is necessary to its operation, have always been held to be within the legislative power *until the bar is complete.*")(emphasis added).

Thus, there is no principled basis on which to defend either the Government's proposed rule or, for that matter, its proposed limitation. Congress may change an established time bar, even with the effect of reviving claims that would otherwise remain "dead" due to the lapse of time. But where the courts have *adjudged* a claim to be time-barred, Congress cannot compel the courts to reopen a settled judgment and apply the subsequent change in place of the time bar that originally resolved the case, even by giving the new provision retroactive effect. Where a Federal court enters judgment in a case on the basis of a time bar, it confers upon the

prevailing party a right based on the protections that the time bar provides. Applying the general principles of existing law to specific circumstances, and enforcing the rights between parties created thereby constitute the essence of the judicial power.

IV.

In only one context has the Supreme Court ratified acts of Congress which specifically required the courts to reconsider issues which had been previously adjudicated and upon which the courts had rendered a final judgment. The shareholders and the Government argue that these cases instruct our present situation; we read them as applying very narrowly, and as standing on a distinct and specifically enumerated constitutional power of Congress. Where the United States has been party to a lawsuit, and the court has rendered judgment in favor of the United States, the Supreme Court has recognized Congress's power to authorize relitigation of the same issues, and have the courts apply such new law as Congress passes retroactively to the same case. While such legislation erases the effects of judgments of the Federal courts, it does not trespass upon the power of the judiciary; the Court has viewed such an act as tantamount to a waiver of liability by the Government, and has ratified such an act as a permissible exercise of Congress's explicit Article I power to pay the debts of the United States.

The shareholders and the Government cite the recent Supreme Court decision in *Robertson v. Seattle Audubon Society*, 112 S. Ct. 1407 (1992), and its decision in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), to show that the Constitution does not prohibit Congress from reopening final judgments of the Federal courts. In *Seattle Audubon*, the Court approved an act of Congress which had amended laws specifying what areas of the Northwest national forests, eco-realm of the elusive northern spotted owl, could be logged. As part of this provision, Congress "determin[ed] and direct[ed]" that the new specifications apply to two cases which the statute

noted by name. *Seattle Audubon*, 112 S. Ct. at 1411-12, nn.1-3. In *Sioux Nation*, Congress acted to permit the plaintiff Indians, who had been pressing their claims in court for nearly a century, and who had lost appeals before the Supreme Court twice before, to relitigate before the Court of Claims; the statute directed the Court of Claims to review the case anew without regard to the prior judgments that the claims court and the Supreme Court had previously rendered in favor of the Government. *Sioux Nation*, 448 U.S. at 389. The Supreme Court upheld that statute as well.

Neither case stands in opposition to the Court's longstanding rule against Congressional interference with the settled judgments of the Federal courts. In neither instance did Congress compel the Federal courts to vacate, revise, or reconsider final judgments rendered in cases between private parties. The cases Congress named specifically in the statute considered in *Seattle Audubon* were pending cases, not decided cases. Indeed, the petitioners challenged the statute on the grounds that Congress had infringed on the judiciary power by prescribing the rule of decision in those cases in contravention of the *Klein* doctrine,[14] not that Congress

[14] *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871) established the rule that Congress cannot "prescribe a rule for the decision of a cause in a particular way." *Klein*, 80 U.S. at 146. After the Civil War, citizens of the former Confederacy could petition the Court of Claims under a 1863 law for a return of property, or proceeds therefrom, confiscated by Federal troops. The petitioners had to prove that they had not fought in the war, and had to prove their loyalty to the Union. Lincoln had issued a general pardon to any Southerner who swore loyalty to the Union. The Supreme Court held that a pardon served as sufficient proof of loyalty and noncombatant status. *United States v. Padelford*, 76 U.S. 531 (1869). In response to *Padelford*, Congress passed a new law which directed the Court of Claims to hold all such pardons inadmissible on behalf of the claimants for the purposes of these petitions; the possession of such a pardon would instead be deemed proof of disloyalty. *Klein* held the new law unconstitutional as a legislative subversion of the judicial function. While the *Klein* doctrine similarly protects the judiciary power from legislative encroachment, we believe § 27A(b) forces the courts to rule again on cases they have dismissed with prejudice, not that it forces the courts to rule on those cases (or any cases) in a particular way. *But see Henderson v. Scientific-Atlanta*,

had interfered with settled judgments. *Seattle Audubon*, 112 S. Ct. at 1414-15.

Sioux Nation answered directly the objection that Congress could not "disturb[ ] the finality of a judicial decree" under the longstanding rule set out in *Hayburn's Case*. *Sioux Nation*, 448 U.S. at 391-92. The Court disposed of the objection by framing the issue in terms of Congress's recognized power "to waive the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States." *Id.* at 396-97 (citing *United States v. Cherokee Nation*, 202 U.S. 101 (1906)). In approving this action, the Court in no way cast doubt on the continuing vitality of the rule in *Hayburn's Case*. The Court noted that it had in previous cases "affirm[ed] the broad constitutional power of Congress to define and 'to pay the Debts . . . of the United States.'" *Id.* at 397 (quoting U.S. Const., Art. I, § 8, cl. 1). Where Congress acts to allow litigants to reassert failed claims against the Government, it does not

> interfere with the administration of justice. Congress are here to all intents and purposes the defendants, and as such they come into court through this resolution and say that they will not plead the former trial in bar, nor interpose the legal objection which defeated a recovery before.

Nock v. United States, 2 Ct. Cl. 451, 457-58 (1867)(approving a joint resolution of Congress authorizing the Court of Claims to reconsider a claim against the United States previously decided in favor of the Government, and to decide the claim "in accordance with the principles of equity and justice")(*quoted in Sioux Nation*, 448 U.S. at 398). Since waiving the defense of res judicata does not "reverse[ ] a decree of [a] court," *Sioux Nation*, 448 U.S. at 398 (quoting *Nock*, 2 Ct. Cl. at 457-58), statutes in which Congress imposes upon itself

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971 F.2d 1567, 1576 (Wellford, J., dissenting) (Section 27A violates *Klein* doctrine).

"a legal, in recognition of a moral, obligation to pay" claims against it do not "encroach upon the judicial function which . . . had previously [been] exercised in adjudicating that the obligation was not legal" and are therefore permissible. *Id.* at 401 (quoting *Pope v. United States*, 323 U.S. 1, 9-10 (1944)). We do not see this recognition of a constitutionally enumerated power of Congress as creating an exception to the longstanding rule against disturbing judgments rendered in favor of private parties, much less as a rejection of that rule, as the Government suggests. Indeed, the *Sioux Nation* case allows Congress the power only to ratchet the Government's liability to claimants in *favor* of private parties; Congress may not disturb final judgments rendered against the United States, since to allow this power would be to permit Congress to act as a judge in its own case to decide a dispute in its favor. *Id.* at 404-05 (citing *Klein*).

Needless to say, the very existence of this appeal suggests that defendants have not chosen to waive their defenses of res judicata with which the District Court vested them in dismissing the shareholders' case with prejudice as time barred. Appellants here simply fail to draw a defensible constitutional parallel between judgments rendered in favor of the United States and judgments rendered in favor of private parties.

V.

We strongly object to the idea put forth by the Government that the judgment rendered in favor of the defendants by the District Court was not truly "final" because of the speed with which Congress acted to undo that judgment. Some final judgments are less final than others only to the extent that some pregnant women are less pregnant than others. The vesting of rights in parties to judgments does not depend upon the consent of Congress, tacit or explicit. And a subsequent act of Congress purporting to divest those rights violates the

Constitution regardless of the haste with which the vote is taken and the act signed into law.

The shareholders and the Government argue that Congress could properly remedy the "windfall" that *Lampf* bestowed upon the defendants here and in similar actions. True, the litigants had proceeded under the assumption that the Kentucky Blue Sky law would apply, but the Supreme Court read the Federal securities laws differently.[15] Once the Court had determined the rights of the parties in *Lampf*, those parties' rights were fixed; similarly, once the District Court applied *Lampf* to dismiss with prejudice the present litigation, and that decision was not appealed, the rights of these parties were fixed, and the shareholders' claims forever precluded. Without a doubt, certain members, and presumably a majority, of Congress believed these results to be unfair, and, as the Government argues, a "windfall" for the respective defendants.[16] However, Congress may not retrospectively vacate decided cases, regardless of how compelling the perceived injustice visited upon the parties by a valid exercise of the judicial power.

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[15]And, we note, correctly, according to Congress. In enacting § 27A, Congress did not "change the underlying law" by repealing, amending or replacing the one year/three year time bar the *Lampf* Court derived from the securities laws, but eliminated only the applicability of that time bar, both to the claims asserted in *Lampf* itself and to all cases dismissed by the retroactive application of *Lampf*. This act of Congress does nothing more than command the courts to ignore (for a while) a valid judgment of the Supreme Court, adding salt to an already grievous wound.

[16]See, for example, the comments of Senator Bryan in support of § 27A:

> The Supreme Court's decision in *Lampf*, June 20, 1991, in effect frees Michael Milken and scores of other felons and defendants of responsibility to pay back the people they have swindled. It would be a monstrous injustice that the icons of [g]reed in effect escape responsibility by reason of a Supreme Court decision that is given retroactive application. All we seek is to give the victims a fair day in court.

137 Cong. Rec. S18,624 (daily ed. Nov. 27, 1991).

VI.

Our system of Federal government vests in the Congress the legislative power, and in the Article III courts the judicial power. The Constitution makes this allocation of powers explicit, and there is nothing equivocal in its language. It is true that some recent decisions of the Supreme Court have evidenced a willingness to find that the separation of powers so "essential to the preservation of liberty," *Mistretta v. United States*, 488 U.S. 361, 380 (1989), is not offended so long as the actions of one branch do not involve an attempt to increase the powers of that branch at the expense of the powers of another branch, or usurp or impermissibly undermine the powers properly belonging to another branch. *See generally Mistretta*, 488 U.S. 361; *Morrison v. Olson*, 487 U.S. 654 (1988).

However, we believe that even if this trend by the Supreme Court may be said to vindicate the "a little separation is enough" view of this essential doctrine, the case at bar clearly represents the irreducible minimum of the separation required to preserve the system's last vestiges of federalism. For if Congress may by legislation reverse or vacate the final judgments of the Federal courts, then Congress has rendered the whole function of the judiciary futile: whether "the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department," *Mistretta*, 488 U.S. at 381 (quoting *The Federalist* No. 47 (Madison)) is left subject only to the self-restraint of the legislature. As Jefferson wrote,

> Nor should our assembly be deluded by the integrity of their own purposes, and conclude that these unlimited powers will never be abused, because themselves are not disposed to abuse them .... The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold,

> than to trust to drawing his teeth and talons after he shall have entered.

Thomas Jefferson, *Notes on the State of Virginia*, Query 13, 121 (1784)(*reprinted in* Ralph Lerner and Philip B. Kurland, eds., 1 *The Founders' Constitution* 320 (1987)). Were the validity of the judgments of the judicial branch to depend on the approval of the legislative branch, how much more fully could the legislature increase its own powers at the expense of the judiciary, or usurp or undermine the powers properly belonging to the judicial branch? What part of the camel would then remain outside the tent?

Where Congress disagrees with the manner in which the judiciary has interpreted a statute, it may amend that statute so as to effect the proper congressional intent, and thus render the faulty judicial interpretation moot. But Congress may not require the Federal courts to nullify or vacate their properly rendered judgments, regardless of what injustice Congress believes those judgments have visited upon private parties. As the judges writing to George Washington in *Hayburn's Case* sagely reflected,

> [I]t is as much our inclination, as it is our duty, to receive with all possible respect every act of the Legislature, and that we never can find ourselves in a more painful situation than to be obliged to object to the execution of any, more especially to the execution of one founded on the purest principles, of humanity and justice, which the act in question undoubtedly is. But, however lamentable a difference in opinion really may be, or with whatever difficulty we may have formed an opinion, we are under the indispensable necessity of acting according to the best dictates of our own judgment, after duly weighing every consideration that can occur to us; which we have done on the present occasion.

2 U.S. at 409-10 n.2 (1792). Since § 27A(b) unambiguously requires courts to do so, we hold that subsection to be an unconstitutional usurpation of the judiciary power. We accordingly **AFFIRM** the judgment of the District Court denying the shareholders' motion to reinstate their lawsuit.

DAMON J. KEITH, Circuit Judge, concurring in part and dissenting in part.

The crux of the majority's argument is that section 27A(b) violates the constitutional principle of separation of powers by asking courts to reverse final judgments. The majority essentially argues that section 27A(b) allows an impermissible reopening of adjudicated cases. Although I agree that section 27A(b) cannot be constitutionally applied to the plaintiffs in the instant case, I write separately because I do not believe that section 27A(b) violates separation of powers principles in all contexts. To the contrary, section 27A(b) is an example of Congress permissibly overriding a judicial interpretation of a statute, without violating principles of separation of powers.

The issue of finality is only relevant in this case because the plaintiffs did not appeal the district court's initial dismissal of their claim. If the plaintiffs had appealed that ruling, the judgment could not be considered "final" under any analysis, but instead "pending" until it had completed its way through the appellate process. In *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993), the Ninth Circuit held that section 27A(b) did not violate principles of finality for cases which had been appealed. The court stated that:

> These cases are properly construed as "pending" cases for separation of powers purposes. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6, 107 S. Ct. 708, 712 n. 6, 93 L.Ed.2d 649 (1987) (judgment is "final" and case is no longer pending only after "the availability of appeal [is] exhausted, and the time for a petition for certiorari [has] elapsed or a petition for certiorari finally [has been] denied"); *see also Georgia Ass'n of Retarded Citizens v. McDaniel*, 855 F.2d 805, 813 (11th Cir. 1988) ("When it so intends, [Congress'] ability to affect the content of a nonfinal judgment in a civil case, through retroactive legislation

> ceases only when a case's journey through the courts comes to an end."), *cert. denied*, 490 U.S. 1090, 109 S. Ct. 2431, 104 L.Ed.2d 988 (1989); *de Rodulfa v. United States*, 461 F.2d 1240, 1253 (D.C.Cir.) ("[T]he suit is pending until the appeal is disposed of, and until disposition any judgment appealed from it is still *sub judice*.") (internal quotations omitted)), *cert. denied*, 409 U.S. 949, 93 S. Ct. 270, 34 L.Ed.2d 220 (1972).

Id. at 1571.

The Seventh Circuit reached the same conclusion in *Berning v. A.G. Edward & Sons, Inc.*, 990 F.2d 272 (7th Cir. 1993). The court reasoned that, because the case was pending on appeal at the time that section 27A was passed, there was no final judgment to be upset. The court stated that:

> The principle that Congress may impose new legal rules applicable in pending cases was recognized by the Supreme Court almost two hundred years ago in *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110, 2 L.Ed. 49 (1801). Because Congress is free to make changes in the law applicable to pending civil cases, "[t]he legislature may change a statute of limitations at the last instant, extending or abrogating the remedy for an established wrong." *Tonya K. ex rel. Diane K. v. Board of Education*, 847 F.2d 1243, 1247 (7th Cir.1988).

Id. at 277.

In the case at hand, Congress was unable to protect these litigants under section 27A(b), because by the time 27A(b) was enacted, the time period for filing an appeal had passed. Nevertheless, for those litigants who did appeal the district court's initial dismissal of their claim, section 27A(b) does not disturb final judgments, and is

therefore consistent with separation of powers requirements.

Courts are under a duty to impose a saving interpretation of an otherwise unconstitutional statute so long as it is "fairly possible to interpret the statute in a manner that renders it constitutionally valid." *Seattle Audubon Soc'y v. Robertson*, 112 S. Ct. 1407 (1992); *Communications Workers of Am. v. Beck*, 487 U.S. 735, 762 (1988). Accordingly, I would **AFFIRM** the judgment of the district court on the grounds that section 27A(b) cannot be constitutionally applied to the litigants in the instant case, but I would not find section 27A(b) unconstitutional as applied to litigants who appealed the initial dismissal of their claims.

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY FILED APRIL 13, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 87-438

ED PLAUT, ET AL.,

PLAINTIFFS,

V.

SPENDTHRIFT FARM, INC., ET AL.,

DEFENDANTS.

MEMORANDUM OPINION AND ORDER

This matter is before the court upon the motion of plaintiffs to reinstate claims under § 10(b) of the Securities Exchange Act of 1934. The motion has been fully briefed and argued to the court, and is ripe for decision.

BACKGROUND

This action is a consequence of the decline and fall of one of the Commonwealth's premier thoroughbred horse farms. A public offering of common stock in defendant, Spendthrift Farm, Inc, was made in 1983. As a result, plaintiffs purchased shares in the corporation. Success did not follow.

Plaintiffs filed this suit on November 25, 1987, under § 10(b)

of the Securities Exchange Act of 1934, and Securities and Exchange Commission Rule 10b-5. [Record #1]. It is undisputed that this filing came more than three years after plaintiffs' purchase of shares.

On June 20, 1991, while this litigation was still pending, the United States Supreme Court issued its decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. __, 111 S. Ct. 2773 (1991). *Lampf* held that a uniform federal limitation period existed for private suits under § 10(b) and Rule 10b-5. These suits must be brought within one year of the date the violation is discovered, and never later than three years after the violation occurs. On the same day, the Court also decided *James B. Beam Distilling Co. v. Georgia*, 501 U.S. __, 111 S. Ct. 2439 (1991), which the parties agree required retroactive application of the *Lampf* decision.

Following the decision in *Lampf*, this court determined that plaintiffs had filed this suit outside the limitations period. Accordingly, all of plaintiffs' federal and pendent state claims were dismissed and final judgment was entered. [Record #181]. Plaintiffs did not appeal this judgment.

On November 27, 1991, Congress passed the Federal Deposit Insurance Corporation Improvement Act of 1991. Pub. L. No. 102-242, 105 Stat. 2387 (1991). It was signed into law by the President on December 19, 1991. Section 476 of this act added § 27A to the Securities Exchange Act of 1934.[1] This new section purports to

---

1. Section 27A reads as follows:

> Sec. 27A. (a) EFFECT ON PENDING CAUSES OF ACTION. The limitation period for any private civil action implied under § 10(b) of this Act that was

(Cont'd)

restore the limitations period in effect on June 19, 1991, the day before the *Lampf* decision, for all cases pending on or before that date, including those cases which were dismissed subsequent to *Lampf* for failure to meet the *Lampf* limitations period. § 27A(b).

On February 11, 1992, plaintiffs in the present case filed a motion to reinstate their claims under § 10(b) and rule 10b-5. Defendants raised several arguments in opposition to the motion to reinstate. The court heard arguments on April 3, 1992, and orally overruled the motion. [Record #202]. This memorandum opinion sets forth the basis for that ruling.

(Cont'd)

> commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) EFFECT ON DISMISSED CAUSES OF ACTION. Any private civil action implied under § 10(b) of this Act that was commenced on or before June 19, 1991 —
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after the date of the enactment of this section.

Appendix C

STANDARD OF REVIEW OF CONGRESSIONAL ACTION

Defendants challenge § 27A on the ground that it offends the separation of governmental powers established in the United States Constitution by impermissibly encrouching upon the power of the judiciary. In evaluating a statute enacted by Congress, the court must avoid a constitutional question, if at all possible. *Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 105 (1944). If plaintiffs cannot meet the requirements necessary for reinstatement of their claims under § 27A, the court need not reach the constitutional question.

PROCEDURAL REQUIREMENTS OF § 27A

Plaintiffs must meet several requirements under § 27A, for reinstatement to be permitted. Since all claims have been dismissed, § 27A(b) applies.

First, this action must have been commenced prior to June 19, 1991, and that is clearly the circumstance. Next, the action must have been dismissed as time barred subsequent to June 19, 1991, and that also has occurred.

Third, plaintiffs must have timely filed this action under the limitation period applicable in this jurisdiction on June 19, 1991. In this Circuit, the limitations period in § 10(b) and rule 10b-5 cases prior to June 19, 1991, was determined by looking to the state statute of limitations which best effectuates the purpose of the federal securities laws. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 210 n. 29 (1976); *Charney v. Thomas,* 372 F.2d 97, 100 (6th Cir. 1967). For actions brought in Kentucky, the relevant limitations period was provided by Ky. Rev. Stat. 292.480(3). *Carothers v. Rice,* 633 F.2d 7, 15 (6th Cir. 1980), *cert. denied,* 450 U.S. 998

Appendix C

(1981). This statute provides that suit must be brought within three years of the contract of sale of the securities. Although this is a state statute, federal law determines when it begins to run. *Holmberg v. Armbrecht,* 327 U.S. 392, 397 (1946). Under federal law, a statute of limitations begins to run when the fraud is or should be discovered. *Herm v. Stafford,* 663 F.2d 669, 682 (6th Cir. 1981). Accordingly, the limitations period which applied to this action on June 19, 1991, was x plus three years, with x being the date the fraud was or should have been discovered.

In ruling on previous motions to dismiss, Magistrate Judge Cook concluded in his Proposed Findings of Fact, [Record #86], that plaintiffs' complaint and amended complaint contained sufficient allegations of diligence to satisfy the limitations requirement. *See Auslender v. Energy Management Corp.,* 832 F.2d 354 (6th Cir. 1987). Objections were filed to the recommendation of the Magistrate Judge. [Record #87-90, 92]. However, due to the circumstances of the case, these objections were never ruled upon.

In determining whether this action was timely filed under former law, the court has the benefit of plaintiffs' complaint, [Record #1], amended complaint, [Record #2], and second amended complaint, [Record #86]. A review of these documents persuades the court that this action was timely filed under the law as it was understood on June 19, 1991, and that the allegations contained in these documents, particularly the second amended complaint, sufficiently plead the exercise of diligence in ascertaining the existence of fraud. Plaintiffs meet this requirement of § 27A(b).

Finally, plaintiffs must have filed their motion for reinstatement within sixty (60) days of the enactment of § 27A.

Final enactment occurred on December 19, 1991, when the President signed the legislation, and plaintiffs filed their motion on February 11, 1992. This requirement has been met.

Plaintiffs have fulfilled the requirements for reinstatement prescribed by § 27A(b). The court must now consider defendants' constitutional arguments.

CONSTITUTIONALITY OF § 27A

Defendants argue several variations upon the theme that this section is an unconstitutional exercise of legislative power. The court need only consider one of these arguments in determining whether § 27A(b) is unconstitutional as it applies to this case.[2] A very narrow question is presented: May Congress direct this court to reinstate a cause of action upon which judgment has been entered, when that judgment is final in all respects and has not been appealed?

As early as 1792, the Supreme Court recognized that Congress cannot reverse or suspend a specific decision of a federal court, *Hayburn's Case,* 2 U.S (2 Dal.) 409 n. 2 (1972). Congress may have had noble intentions in passing § 27A. This is reflected in Senator Bryan's statement that this section was intended to prevent "the unfair application of the Supreme Court's *Lampf* decision to those cases that were pending at the time that the decision came down." 137 Cong. Rec. S18, 623-24 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan). However, although Congress may enact retrospective laws of a remedial nature, "no legislative act can change the rights and liabilities of parties which have been

2. As all claims in this case have been dismissed, the court will only evaluate § 27A(b), and will express no opinion on the constitutionality of § 27A(a).

established by a solemn judgment." *Massingill v. Downs,* 48 U.S. (7 How.) 758, 767 (1849).

The facts of the present case parallel those addressed by the Supreme Court in *McCullough v. Virginia,* 172 U.S. 102 (1898). There, as here, a final judgment had been entered according to the law as it then existed. Although the legislature in question was the Virginia General Assembly and not the United States Congress, the fundamental principle remains the same: "Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment, the power of the legislature to disturb rights created thereby ceases." *Id.,* at 123-24.[3]

There are two principal reasons for this prohibition. First, when final judgment has been entered, the rights of the parties have been fixed, and legislative modification amounts to an unlawful taking. *Hodges v. Snyder,* 261 U.S. 600, 603 (1923). In its Statement of Interest, [Record #198], the United States argues that judgment based upon a statute of limitations does not create vested rights. This argument relies upon *Chase Securities Corp. v. Donaldson,* 325 U.S. 304 (1945), which recognized that Congress could modify limitations periods as they inpacted pending cases. However, as the United States notes, the Supreme Court has yet to decide whether a dismissal on limitations grounds gives rise to vested rights. The Supreme Court *has* determined that final

3. The court notes that neither of the two primary exceptions to this rule are present in this case. *See United States v. Sioux Nation of Indiana,* 448 U.S. 371 (1980) (Congress may waive res judicata effect of prior judgment in claim against the United States); and *Pennsylvania v. Wheeling & Belmont Bridge Co,* 59 U.S. (18 How.) 421 (1856) (Congress may retroactively modify final judgments to the extent the remedy chosen — injunctive relief rather than damages — directly affected public rather than private rights).

judgment gives rise to vested rights. *McCullough*, 172 U.S., at 124. When a judgment becomes final, it is final for all purposes, regardless of its basis. The rights of the parties are set, and the parties are entitled to treat the matter as closed.

The second reason for prohibiting Congressional reversal of final judgments is the intrusion upon the powers of the judiciary. If Congress were permitted to take action such as that reflected in § 27A(b), this could result in a legislative appeal of judicial action. This is not the governmental scheme intended by the framers of the Constitution. A judgment of a court as it affects the parties before the court cannot be disturbed by the legislature without subverting the constitutional independence of the judiciary. *Daylo v. Administrator of Veterans' Affairs*, 501 F.2d 811, 816 (D.C. Cir. 1974).

This court is required, if possible, to construe § 27A(b) in such a manner as to preclude constitutional inquiry. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). However, the court should not resort to "disingenuous evasion" to avoid a determination of constitutionality. *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933). As applied to this case, § 27A(b) cannot be read in any manner which would withstand constitutional scrutiny. Its inevitable effect, in this case, would abridge defendants' constitutional rights, and that it impermissible. *United States v. O'Brien*, 391 U.S. 367, 385 (1968).

This court must conclude that § 27A(b) is unconstitutional exercise of legislative power, and cannot be permitted to interfere with defendants' final judgment and their vested right therein. The motion to reinstate will be denied.

CONCLUSION

The court having considered the record, having heard the arguments of counsel, and being otherwise sufficiently advised,

Accordingly,

IT IS HEREBY ORDERED:

that the motion of plaintiffs to reinstate claims be, and is DENIED.

This 13th day of April, 1992.

s/ Joseph M. Hood
JOSEPH M. HOOD, JUDGE

(2)

No. 93-1121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ED PLAUT, *et al.*,

Petitioners,

v.

SPENDTHRIFT FARM, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

MEMORANDUM OF RESPONDENTS

---

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IN THE

Supreme Court of the United States

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93-1121

ED PLAUT, ET AL.,

Petitioners,

v.

SPENDTHRIFT FARM, INC., *ET AL.*,

Respondents.

On Petition for
Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

MEMORANDUM OF RESPONDENTS

Respondents Gibson, Dunn & Crutcher and Francis M. Wheat file this memorandum in connection with the petition for writ of certiorari in this case.

Petitioners seek review of the Sixth Circuit's decision below holding that application of § 27A of the Securities and Exchange Act of 1934, 15 U.S.C. § 78aa-1, to reopen closed cases and to disrupt final, unappealed judgments of Article III courts violates the constitutional separation of powers and "vested rights" doctrines. *See* Pet. App. 25a-26a; *id.* 14a n.12. On January 10, 1994, this Court granted certiorari in

First RepublicBank Corp. v. *Pacific Mutual Life Ins. Co.*, No. 93-609, *cert. granted*, Jan. 10, 1994, which raises the question whether § 27A, as applied to final, unappealed judgments, "contravenes the separation of powers doctrine and the due process clause of the United States Constitution."[1]

Because these two cases raise similar issues, respondents respectfully suggest that the Court hold the petition for writ of certiorari in this case pending the Court's disposition of *First RepublicBank*.

Respectfully submitted,

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February 11, 1994

[1] Pet. for Cert. in No. 93-609, at i.

No. 93-1121

In The

Supreme Court of the United States

October Term, 1993

ED PLAUT; his wife, NANCY McHARDY PLAUT; JOHN GRADY, on behalf of themselves and all others similarly situated,

Petitioners,

v.

SPENDTHRIFT FARM, INC.; BATEMAN EICHLER, HILL RICHARDS, INC.; FRANCIS M. WHEAT; GIBSON, DUNN & CRUTCHER; DELOITTE, HASKINS & SELLS; NORMAN D. OWENS; AMERICAN INTERNATIONAL BLOODSTOCK AGENCY, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether Section 27A(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1(b), to the extent it requires courts to reinstate certain actions brought under Section 10(b) of the Act that were dismissed with prejudice as untimely pursuant to this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. ___, 111 S.Ct. 2773 (1991), and from which timely appeal could not be taken, violates the constitutional separation of powers in that it permits revision by another branch of a final decision of an Article III court?

LISTING OF PARENT COMPANIES AND SUBSIDIARIES PURSUANT TO RULE 29.1

Respondent, Spendthrift Farm, Inc., has no parent companies. Respondent, Spendthrift Farm, Inc., has no non-wholly owned subsidiaries.

Respondent, American International Bloodstock Agency, Inc., has no parent companies. Respondent, American International Bloodstock Agency, Inc., has no subsidiaries.

Respondent, Bateman Eichler, Hill Richards, Inc., is now known as Kemper Securities, Inc. The corporation has one subsidiary, Kemper Clearing Corp. Kemper Securities is itself a subsidiary of Kemper Securities Holdings, Inc., which is a subsidiary of Kemper Financial Companies, Inc., which is a subsidiary of Kemper Corporation, which is a publicly-held corporation.

Respondent, Deloitte & Touche (formerly Deloitte Haskins & Sells), has no parent companies. Respondent, Deloitte & Touche, has no non-wholly owned subsidiaries.

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No. 93-1121

In The

Supreme Court of the United States

October Term, 1993

ED PLAUT; his wife, NANCY MCHARDY PLAUT; JOHN GRADY, on behalf of themselves and all others similarly situated,

Petitioners,

v.

SPENDTHRIFT FARM, INC.; BATEMAN EICHLER, HILL RICHARDS, INC.; FRANCIS M. WHEAT; GIBSON, DUNN & CRUTCHER; DELOITTE, HASKINS & SELLS; NORMAN D. OWENS; AMERICAN INTERNATIONAL BLOODSTOCK AGENCY, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

The Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the Opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 1 F.3d 1487 (6th Cir. 1993) and is reprinted in Petitioners' Appendix B at pages 3a to 30a. The decision of the United States District Court for the Eastern District of Kentucky is reported at 789 F. Supp. 231 (E.D.Ky. 1992).

STATUTE INVOLVED

Section 27A(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1(b) (Supp. IV 1992), provides:

> (b) EFFECT ON DISMISSED CAUSES OF ACTION. – Any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991 –
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

COUNTERSTATEMENT OF THE CASE[1]

In November 1983, Spendthrift Farm, Inc. made a public offering of common stock. The Petitioners, Ed Plaut, Nancy McHardy Plaut and John Grady, subsequently purchased shares in the corporation. Thereafter, on November 25, 1987, the Petitioners filed suit claiming that in making the offering, the Respondents violated Section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act") and Securities and Exchange Commission Rule 10b-5. This action was commenced more than three years after the Petitioners' purchase of the common stock.[2]

The original action was still pending before the district court on June 20, 1991, when this Court rendered its decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. ___, 111 S.Ct. 2773 (1991). *Lampf* holds that private actions under Section 10(b) of the 1934 Act are subject to a uniform federal limitations period drawn from Section 9(e) of the 1934 Act. Section 9(e) provides a one year/three year limitations period, which requires that a suit must be brought within one year after the

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[1] This Joint Brief in Opposition to the Petition for a Writ of Certiorari is filed on behalf of Respondents Spendthrift Farm, Inc.; Bateman Eichler, Hill Richards, Inc.; Deloitte & Touche (formerly Deloitte Haskins & Sells); Norman D. Owens; and American International Bloodstock Agency, Inc.

[2] The merits of the underlying securities law dispute are not relevant to the issues presented to this Court in the Petition for a Writ of Certiorari and this response. Thus, Respondents simply decline to comment upon the Petitioners' characterization and description of the events which precipitated this lawsuit.

violation is discovered, but in any event not later than three years after the violation occurs. 111 S.Ct. at 2782. In announcing the one year/three year limitations period, this Court applied the new period to the parties before it and dismissed the plaintiffs' suit as time barred.

On the same day that *Lampf* was decided, this Court issued its decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S.Ct. 2439 (1991). *Beam* directs that when this Court applies a new rule of law to the litigants in a particular case, that rule must be applied to all other similarly situated litigants. 111 S.Ct. at 2448.

Relying on this Court's decisions in *Lampf* and *Beam*, the district court dismissed Petitioners' claims with prejudice on August 13, 1991. The Petitioners did not appeal from this judgment, and the order dismissing the action became final and unappealable thirty days thereafter.

In response to this Court's decisions in *Lampf* and *Beam*, Congress enacted Section 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236 (1991) (the "1991 Act"). The legislation, which by its terms limits the applicability of *Lampf* to cases filed after *Lampf* was decided, was signed into law on December 19, 1991. Section 476 of the 1991 Act added Section 27A, 15 U.S.C. § 78aa-1 (Supp. IV 1992), to the 1934 Act. Section 27A(a) provides that the limitations period applicable to Section 10(b) actions commenced prior to *Lampf* shall be the limitations period that applied in a particular jurisdiction pre-*Lampf*. Section 27A(b), the portion of the statute at issue in this case, provides for the reinstatement of Section 10(b) actions

that were dismissed as time barred under *Lampf* but were timely filed under the jurisdiction's pre-*Lampf* rules.

Section 27A(b) required motions for reinstatement to be filed within sixty days of the enactment of Section 27A. On February 11, 1992, the Petitioners filed a timely motion to reinstate their claims under Section 10(b) and Rule 10b-5 pursuant to Section 27A(b). The district court found that reinstatement of the case pursuant to Section 27A(b) would impermissibly require the court to overturn a final unappealable judgment. The district court thus held Section 27A(b) to be an unconstitutional exercise of legislative power and denied the Petitioners' motion to reinstate on April 13, 1992. *Plaut v. Spendthrift Farm, Inc.*, 789 F. Supp. 231 (E.D.Ky. 1992), *aff'd*, 1 F.3d 1487 (6th Cir. 1993).

Petitioners appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit. On August 3, 1993, a three-judge panel of the court of appeals, affirming the district court's holding that Section 27A(b) was unconstitutional, found subsection (b) to be violative of separation of powers principles.[3] The primary basis for the panel's decision was the rule in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) that "Congress may not retroactively disturb final judgments of the Federal courts." *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487, 1493 (6th Cir. 1993), *reh'g denied*, (Oct. 14, 1993), *petition for cert. filed*, 62 U.S.L.W. 3503 (U.S. Jan. 11, 1994) (No. 93-1121).

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[3] The court of appeals limited its review to Section 27A(b) and did not address the constitutionality of Section 27A(a). *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487, 1490 n.5 (6th Cir. 1993).

On October 14, 1993, the Sixth Circuit denied petitions for rehearing filed by the Petitioners and the United States in which those parties made the same arguments advanced in the Petition.

REASONS WHY THE PETITION SHOULD BE DENIED

It is a familiar proposition that a petition for a writ of certiorari "will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10. In cases such as the present one, this normally requires that:

> a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; . . . [or] has decided an important question of federal law which has not been, but should be, settled by this Court.

Sup. Ct. R. 10.1(a), (c).

None of the issues raised in the Petition[4] satisfy this Court's stringent requirements for granting a writ of certiorari. The question of federal law raised by the Petition, whether Congress may retroactively disturb the final judgments of the Federal Courts, has been long-settled since the decisions in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). Moreover, the Sixth Circuit's decision *on this issue*

[4] Petitioners erroneously claim that the Sixth Circuit found both subsections (a) and (b) of Section 27A unconstitutional. The court of appeals expressly limited its review to Section 27A(b) and did not address the constitutionality of Section 27A(a). *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487, 1490 n.5 (6th Cir. 1993).

is not inconsistent with that of any of the other United States Courts of Appeals. Because the Petition raises no "special and important reasons," review by this Court is unnecessary and the Petition should be denied.

I. THE SIXTH CIRCUIT CORRECTLY HELD THAT SECTION 27A(b) OF THE SECURITIES EXCHANGE ACT VIOLATED THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS

Insofar as Section 27A(b) is applicable to decisions final and unappealable at the time of its enactment,[5] the Sixth Circuit plainly was correct in concluding that "[i]f the statute which gave rise to *Hayburn's Case* violated the

[5] Section 27A(b) requires that upon timely motion by a plaintiff, an action dismissed pursuant to this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. ___, 111 S.Ct. 2773 (1991) "shall be reinstated." The section makes no distinction between actions that were final and could no longer be appealed at the time Section 27A was enacted, and actions that were still pending at the time.

In addition to the reasons stated above, the Petition should be denied because Section 27A can and should be interpreted as applying only to actions still pending, and not yet final, on the date the section was enacted. This would avoid the serious constitutional question presented by interpreting Section 27A(b) in a way that makes it applicable to settled judgments. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (practice of Court is to avoid deciding constitutional questions when it is unnecessary to do so); *see also Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78 (2d Cir. 1993) (in considering separation of powers challenge to reinstatement of claims pursuant to Section 27A(b), court distinguished between final unappealable judgments and claims which had not yet passed into final judgment).

Constitution, then § 27A(b) cannot stand, *a fortiori*." *Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487, 1493 (6th Cir. 1993), *reh'g denied*, (Oct. 14, 1993), *petition for cert. filed*, 62 U.S.L.W. 3503 (U.S. Jan. 11, 1994) (No. 93-1121). The basis for the Sixth Circuit's conclusion was that under *Hayburn's Case* and the principle of separation of powers, "Congress may not retroactively disturb final judgments of the Federal courts." *Id.* Even Judge Keith, who concurred with the panel majority in the result, agreed "that section 27A(b) cannot be constitutionally applied to the litigants in the instant case." *Id.* at 1500.[6]

Hayburn's Case stands for the bedrock principle that neither the legislative nor the executive branches of the federal government may review or disturb a final judgment of an Article III court. In *Hayburn's Case*, Congress had enacted a statute that required Article III courts to hear and determine the pension claims of disabled Revolutionary War veterans. However, Congress gave the Secretary of War the authority to deny pensions where he suspected "imposition or mistake." *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 n.1 (1792). Although this Court never

[6] Judge Keith wrote separately only to make clear his opinion that Section 27A(b) did not violate "separation of powers principles in all contexts," but only to the extent it is applied to final judgments. *Plaut*, 1 F.3d at 1500. Judge Keith believed that Section 27A(b) might constitutionally be applied to cases that were dismissed by the district court, but pending on appeal, at the time Section 27A was enacted. *Id.* He disagreed with the panel majority to the extent the panel majority's decision might be read more broadly. Respondents are not certain that the panel decision is any broader than the grounds relied upon by Judge Keith.

rendered a decision in the case, the statute was invalidated by three Circuit Courts, on which the (then) five Justices of the Supreme Court were sitting.[7]

The three Circuit Courts spoke separately as to the infirmity of the legislation at issue and their reasoning bears great similarity. The decision of the Circuit Court for the District of New York is particularly instructive. The duties assigned to them, the judges believed, were not "properly judicial"

> inasmuch as [the Act] subjects the decisions of these courts . . . first to the consideration and suspension of the Secretary at War, and then to the revision of the Legislature; whereas by the Constitution, neither the Secretary at War, nor any other Executive officer, *nor even the Legislature, are authorized to sit as a Court of Errors on the judicial acts or opinions of this Court.*

Id. at 410 n.1 (emphasis added). Similarly, the Circuit Court for the District of Pennsylvania declared that:

> the business directed by [the Act] is not of a judicial nature. . . . [I]f upon that business, the court had proceeded, its judgments . . . might, under the same act, have been revised and controlled by the Legislature, and by an officer in the Executive department. Such revision and control we deemed radically inconsistent with

[7] The Attorney General's initial request for review was dismissed because the motion was filed *ex officio* and not on behalf of an actual claimant. The second motion for a writ of mandamus, on behalf of William Hayburn, was held under advisement until the next Term, at which time it was dismissed because Congress had enacted a different system for hearing pension claims.

> the independence of that judicial power which is vested in the courts.

Id. Of like view was the Circuit Court for the District of North Carolina:

> no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested.

Id.

This core principle of *Hayburn's Case* – that final, unappealed judgments are immune from legislative review or revision – is long settled,[8] oft-cited,[9] and has

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[8] *See* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.13(e) (2d ed. 1992) ("The principle underlying *Hayburn's Case* and its progeny is that the Article III guarantee of an independent federal judiciary prevents the legislature and the executive from reviewing a judicial decision."); DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888, at 311 n.173 (1985); CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS 57-58 (4th ed. 1983); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 646-47 (1992) ("*Hayburn's Case* . . . clearly establish[es] that the federal courts are constitutionally and jurisdictionally prohibited from issuing one form of advisory opinion – a judgment open to direct revision by Congress or the President."); Girardeau A. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 610 n.94 (1983) ("In *Hayburn's Case* . . . [the Supreme Court] . . . adopted the view that Congress could not require the federal judiciary to take actions that were nonfinal in that they were subject to revision by the executive.").

[9] *See, e.g., C. & S. Air Lines v. Waterman Corp.*, 333 U.S. 103, 113-14 (1948) (citing *Hayburn's Case* for the principle that "the

never been disturbed. As the Tenth Circuit stated in *Johnston v. CIGNA Corp.*, No. 92-1186, 1993 WL 500842 (10th Cir. Dec. 7, 1993), largely adopting the reasoning of the Sixth Circuit's decision in *Plaut*,

> [i]ndeed, excepting the Fifth Circuit's opinion in *Pacific Mut. Life Ins. Co. v. First Republicbank Corp.*, 997 F.2d 39 (5th Cir. 1993), we cannot locate a single case where a court has upheld an attempt by Congress to upset a final, nonappealable judgment in a case between private parties.

1993 WL 500842, at *9 (footnote omitted).

Hayburn's Case is a vital statement regarding the independence of the federal judiciary, as the Sixth Circuit recognized. The core function of an Article III court is in jeopardy if Congress can revise judicial decisions at will. This threat to the judiciary is what prompted the Sixth Circuit to warn that "if Congress may by legislation reverse or vacate the final judgments of the Federal courts, then Congress has rendered the whole function of the judiciary futile." *Plaut*, 1 F.3d at 1499. Given the importance of the principle of *Hayburn's Case*, and the

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firm and unvarying practice of Constitutional Courts [is] to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action"); *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245, 1276-77 (9th Cir. 1988) (Wiggins, J. dissenting), *vacated*, 488 U.S. 1036 (1989) ("The demand that judicial decisions be final, and not be subject to revision by Congress or the President" was first established in *Hayburn's Case*); *Humana Hosp. Corp., Inc. v. Blankenbaker*, 734 F.2d 328, 332-33 (7th Cir. 1984) ("The Supreme Court consistently has held from its earliest days that no decision of a federal court may be reviewed by the legislative branch;" citing *Hayburn's Case*).

correctness of the Sixth Circuit's decision in that regard, review is unnecessary in this case.

II. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE SIXTH CIRCUIT AND ANY DECISION OF ANY OTHER FEDERAL COURT OF APPEALS AS TO THE *HAYBURN'S CASE* RATIONALE

Petitioners predicate their request for a writ of certiorari on a split of authority among the circuits. Yet, there is no such split with regard to the precise basis for the Sixth Circuit's ruling, the decision in *Hayburn's Case*. The Tenth Circuit, which joined the Sixth Circuit in striking down Section 27A(b), also relied upon *Hayburn's Case*. *Johnston v. CIGNA Corp.*, No. 92-1186, 1993 WL 500842 (10th Cir. Dec. 7, 1993). Only the Fifth Circuit, which upheld the statute, failed entirely to address *Hayburn's Case*, neither discussing nor even citing the decision.[10] Thus, as to the issue actually resolved by the Sixth Circuit, there is no split of authority.

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[10] The closest the Fifth Circuit even came to addressing the principle underlying *Hayburn's Case* was in this language: "If we understood a statute's purpose to be the reversal of results in particular controversies between private individuals, we would strike the statute as violative of our authority to decide cases. . . . But § 27A(b) is innocent on this score." *Pacific Mut. Life Ins. v. First Republicbank*, 997 F.2d 39, 54 (5th Cir. 1993), *cert. granted*, 62 U.S.L.W. 3451 (U.S. Jan. 10, 1994) (No. 93-609). Given this statement, the Fifth Circuit's decision is particularly difficult to understand. Section 27A(b) is not "innocent on this score," but plainly upsets a final judgment in a case between private parties.

III. RESPONDENTS REQUEST THAT THIS COURT NOT SIMPLY HOLD THE PETITION, ONLY TO REMAND IN LIGHT OF *PACIFIC MUTUAL*

Respondents recognize that the Petition presents a question that is similar to the issue presented in *Pacific Mut. Life Ins. v. First Republicbank*, 997 F.2d 39 (5th Cir. 1993), *cert. granted*, 62 U.S.L.W. 3451 (U.S. Jan. 10, 1994) (No. 93-609) ("*Pacific Mutual*") in which certiorari has been granted by this Court. Where the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Court, this Court typically grants the petition and sets the case for argument at the same time or postpones consideration of the petition until the other case has been decided and then remands the case for disposition in accordance with that decision. ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE § 4.16, at 192-93 (7th ed. 1993).

Respondents believe that Petitioners' action is barred because Section 27A(b) as applied to them violates the rule in *Hayburn's Case*, and that *Hayburn's Case* is central to the resolution of this issue. Yet, *Hayburn's Case* was neither cited nor discussed by the *Pacific Mutual* court. Accordingly, in the event this Court declines to deny the Petition for a Writ of Certiorari, Respondents respectfully request an opportunity to participate on the merits in order to address this important issue. Thus, Respondents request that this Court not simply hold the Petition, only to remand in light of *Pacific Mutual*.

CONCLUSION

The Petition does not present any questions that warrant review by this Court, and there are no "special and

important reasons" for this Court to issue a writ of certiorari to review those questions. For the foregoing reasons, Respondents submit that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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No. 93-1121

In the Supreme Court of the United States

OCTOBER TERM, 1993

ED PLAUT, ET AL., PETITIONERS

v.

SPENDTHRIFT FARM, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Section 27A(b) of the Securities Exchange Act of 1934, which provides for the reinstatement of certain private securities suits that were dismissed as untimely under *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991), violates the Constitution.

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TABLE OF AUTHORITIES

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-30a) is reported at 1 F.3d 1487. The opinion of the district court (Pet. App. 31a-39a) is reported at 789 F. Supp. 231.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1993. The petitions for rehearing were denied on October 14, 1993. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on January 11, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In November 1987, petitioners filed a private securities fraud suit in the Eastern District of Kentucky. The complaint stated claims arising under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (Exchange Act), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5, as well as pendent state law claims. Pet. App. 31a-32a.

At the time the suit was filed, the Exchange Act did not contain a statute of limitations expressly applicable to claims under Section 10(b) or Rule 10b-5. In the absence of an express federal statute of limitations, the Sixth Circuit, like a number of other courts of appeals, had held that private Rule 10b-5 actions were subject to limitations periods borrowed from state law. See, *e.g.*, *Carothers* v. *Rice*, 633 F.2d 7, 8-9 (1980), cert. denied, 450 U.S. 998 (1981).

On June 20, 1991, while the suit was pending before the district court, this Court issued its decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991). *Lampf* holds that private actions under Section 10(b) are subject to a uniform federal limitations period drawn from Section 9(e) of the Exchange Act, 15 U.S.C. 78i(e). Under that provision, a suit may not be brought more than one year after the fraud is discovered or more than three years after it occurs. 111 S. Ct. at 2782. On the same day that *Lampf* was decided, this Court also decided *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991), in which it disapproved the use in civil litigation of "selective prospectivity"—the practice of applying a new judicial interpretation of the law in the case in which it is announced but not applying it to other pending suits.

This Court applied *Lampf*'s holding adopting a federal limitations period for Section 10(b) actions to the parties in *Lampf* itself. See 111 S. Ct. at 2782; see also *id.* at 2785-2786 (O'Connor, J., dissenting). As a result, under *Beam*, the new limitations period adopted in *Lampf* became applicable to all other pending private Rule 10b-5 actions. In August 1991, relying on *Lampf* and *Beam*, the district court dismissed petitioners' federal securities claims as time-barred and entered final judgment against petitioners. Petitioners did not appeal the judgment, and the time for appeal expired in September 1991. Pet. App. 5a, 32a.

2. Effective December 19, 1991, four months after the dismissal of the federal securities claims in this case, Congress enacted legislation adding Section 27A, 15 U.S.C. 78aa-1 (Supp. IV 1992), to the Exchange Act. See Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2387. Section 27A applies to private Rule 10b-5 actions that were commenced on or before June 20, 1991, the date that *Lampf* was decided. Subsection (a) of Section 27A provides that the limitations periods for such pre-*Lampf* suits shall be the limitations periods that had prevailed in the particular jurisdiction before *Lampf*. 15 U.S.C. 78aa-1(a) (Supp. IV 1992). Subsection (b) of Section 27A provides for the reinstatement of pre-*Lampf* suits that were dismissed as time-barred under *Lampf* but were timely under the particular jurisdiction's pre-*Lampf* rules. 15 U.S.C. 78aa-1(b) (Supp. IV 1992). Subsection (b) required motions for reinstatement to be filed within 60 days of the enactment of Section 27A. 15 U.S.C. 78aa-1(b) (Supp. IV 1992).

Petitioners moved to reinstate their claims pursuant to subsection (b) of Section 27A on February 11, 1992, within the prescribed 60-day period. Pet. App. 5a. In

April 1992, the district court denied the reinstatement motion. The court acknowledged that petitioners satisfied the statutory requirements for reinstatement under subsection (b), but held that subsection (b) violates the separation of powers doctrine and the Due Process Clause. Pet. App. 33a-39a.

3. Petitioners appealed from the denial of their reinstatement motion, and the United States intervened, pursuant to 28 U.S.C. 2403, to defend the constitutionality of subsection (b) of Section 27A.[1] The court of appeals affirmed, agreeing with the district court that subsection (b) violates the separation of powers doctrine. Pet. App. 5a-27a. The court of appeals did not resolve the constitutionality of subsection (b) under the Due Process Clause. Pet. App. 14a n.12.

ARGUMENT

The court of appeals' holding that Section 27A(b) of the Exchange Act is unconstitutional conflicts with *Pacific Mutual Life Ins. Co.* v. *First Republicbank Corp.*, 997 F.2d 39 (5th Cir. 1993). On January 10, 1994, this Court granted certiorari in *First Republicbank* to resolve the conflict and settle the constitutionality of Section 27A(b). *Morgan Stanley & Co.* v. *Pacific Mutual Life Ins. Co.*, No. 93-609. The Court's decision in *Morgan Stanley & Co.* should control the disposition of this case. We therefore suggest that the Court hold the petition in

[1] When the constitutionality of an Act of Congress "affecting the public interest" is called into question in a federal suit to which the United States is not a party, 28 U.S.C. 2403(a) directs the court to "permit the United States to intervene for presentation of evidence * * * and for argument on the question of constitutionality."

this case pending the decision in *Morgan Stanley & Co.* and then dispose of it accordingly.[2]

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of *Morgan Stanley & Co.* v. *Pacific Mutual Life Ins. Co.*, No. 93-609, and disposed of in accordance with the decision in that case.

Respectfully submitted.

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FEBRUARY 1994

[2] Petitioners also suggest (Pet. 7-8) that the decision in this case conflicts with decisions of other courts of appeals regarding the constitutionality of *subsection (a)* of Section 27A, 15 U.S.C. 78aa-1(a). That suggestion is incorrect. This case is governed solely by subsection (b), and the court of appeals therefore had no occasion to resolve the constitutionality of subsection (a). See Pet. App. 6a n.5. The Sixth Circuit is currently considering the constitutionality of subsection (a) in a different case, *Freeman* v. *Laventhal & Horwath*, Nos. 92-6123 & 92-6191 (argued Sept. 20, 1993).

No. 93-1121

In The

Supreme Court of the United States

October Term, 1994

ED PLAUT, NANCY McHARDY PLAUT, and JOHN GRADY,

Petitioners,

v.

SPENDTHRIFT FARM, INC., BATEMAN EICHLER, HILL RICHARDS, INC., FRANCIS M. WHEAT, GIBSON, DUNN & CRUTCHER, DELOITTE HASKINS & SELLS, NORMAN D. OWENS, AMERICAN INTERNATIONAL BLOODSTOCK AGENCY, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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PLAUT, ET AL. v. SPENDTHRIFT FARM, INC., ET AL.
RELEVANT DOCKET ENTRIES FOR THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

DATE	NR.	PROCEEDINGS
11/20/87	1	COMPLAINT. 1 summons & 1 copy issued for each deft and given to atty for service.
11/30/87	2	FIRST AMENDED COMPLAINT. 1 summons & 1 copy issued as to each deft & given to counsel for service.
6/6/88	65	Copy of ORDER DENYING TRANSFER (Multidistrict Litigation Panel) ent: Motion for transfer of Plaut under 28 U.S.C. 1407 denied.
6/27/88	66	ORDER (SR) ent.: that the above action is referred to Hon. James F[illegible]ook to set and conduct a hearing on all pending motions, to set and conduct such pretrial matters as may be appropriate under 28 USC 636(b)(1)(A), and to submit proposed findings of fact and recommendations on all dispositive motions pursuant to 28 USC 636(b)(1)(B). Copies are noted.
9/6/88	86	SECOND AMENDED COMPLAINT
12/2/88	111	NOTICE of deft Spendthrift of Filing of Involuntary Bankruptcy Petition.
12/12/88	112	ORDER (SR) ent: Deft Spendthrift having advised that on 11/18/88 an Involuntary Petition Under Chapter 11 of Title 11, was filed against it, ORDERED

action stayed in its entirety pending further orders of the Court. Copies as noted.

12/14/88 114 MOTION OF plffs to Set Aside or Modify Stay Order, Ref #126

2/21/89 126 ORDER (SR) ent.: that pltffs motion to set aside or modify the stay is hereby DENIED. COM

1/9/91 152 ORDER (JMH) ent. 1/10/91: matter before the Court on pltff. motion to set aside or modify the stay order entered 12/12/88. ORDERED 1) Mag. Cook's recommendation ADOPTED in part; 2) the Stay Order entered 12/12/88 lifted partially as to all defts. save Spendthrift Farms, Inc.; 3) all discovery STAYED pending further orders of the Court; 4) above-styled REMANDED to Mag. Cook for consideration of all pending motions & for reconsideration of his previous recommendation regarding stature of limitations issue once S.Ct. renders decision in *Lamf, Pleva, Lipkind, Prupi & Petigrow v. Gilbertson*. COM/gwb

6/25/91 160 ORDER (JFC) ent.: that on 6/20/91 the Supreme Court handed down its decision in Lampf, Pleava, Lipkind, Prupis & Petigrow v. Gilbertson regarding which statute of limitations is applicable to a private suit brought of the Securities Exchange Act of 1934. It is ORDERED that the parties shall serve and file within 15 days of the date of this Order a Memorandum of Law regarding the effect if any the holding in Gilbertson has on this action and the pending

motions therein. Thereafter, the matter shall stand submitted for the Mag. Judge's consideration. COM/mst

8/13/91 181 ORDER (JMH) ent 08/14/91; that (1) Mag's recommendation as to the disposition of the pltffs Section 10(b) claims is ADOPTED as that of the undersigned; (2) pltffs claims Section 10(b) are dismissed with prejudice; It is ORDERED that the (1) objections are SUSTAINED; (2) that Mag. Cook's Order is SET ASIDE; (3) that the pltffs motion for leave to file a 3rd Amended Complaint is DENIED. COM/mst

2/11/92 182 MOTION of Pltffs to Reinstate Claims under Securities Exchange Act REF #204

4/3/92 202 CIVIL MINUTES (JMH) et.: that matter was called for hearing on plt motion to reinstate claims under the Securities Exchange Act. The Court having considered the briefs of the parties and argument of counsel and being otherwise sufficiently advised, it is ORDERED that the motion to reinstate this action is OVERRULED, Section 27A of the securities and exchange act of 1934 is determined to be unconstitutional as applied to the facts of this case. COM/ms

4/13/92 204 MEMORANDUM OPINION AND ORDER (JMH) ent. 4/14/92; that matter is before court upon the motion of pltffs to reinstate claims under Securities Exchange Act of 1934. It is ORDERED that motion of pltffs to reinstate claims is DENIED. COM/mst

4/30/92 205 NOTICE OF APPEAL to 6CCA on behalf of Pltff. COM/mst

8/31/92 RECORD FORWARDED TO 6CCA. mst

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DATE PROCEEDINGS

5/4/92 Civil Case Docketed. Notice filed by Appellants Ed Plaut, Nancy McHardy Plaut & John Grady. (mcp)

3/1/93 CAUSE ARGUED on 3/1/93 by J. Montjoy Trimble for Appellant John Grady, Appellant Nancy McHardy Plaut, Appellant Ed Plaut, Mark B. Stern for Intervenor USA, Glenn C. Van Bever for Appellee Spendthrift Farm Inc, L. Clifford Craig for Appellee Deloitte Haskins, Robert S. Miller for Appellee Amer Intl Bloodstock, Appellee Norman D. Owens before Judges Keith, Batchelder, Churchill. [92-5591] (paw)

8/3/93 OPINION filed: The judgment of the district court denying the shareholders' motion to reinstate their lawsuit is AFFIRMED, decision for publication pursuant to local rule 24 [92-5591]. Damon J. Keith, Circuit Judge delivered a separate opinion concurring in part and dissenting in part, Alice M. Batchelder, Authoring Judge, James P. Churchill, District Judge. (cb)

8/13/93 PETITION for en banc rehearing filed by J. Montjoy Trimble for Appellants John Grady, Nancy McHardy Plaut, Ed Plaut. Certificate of service dated 8/12/93. [92-5591] (pe)

8/17/93 PETITION for en banc rehearing filed by Douglas N. Letter for Intervenor USA. Certificate of service dated 8/16/93. [92-5591] (pe)

10/14/93 ORDER filed denying two petitions for en banc rehearing filed by Douglas N. Letter and J. Montjoy Trimble [92-5591] Damon J. Keith, Alice M. Batchelder, Circuit Judges, James P. Churchill, District Judge. Circuit Judges Keith and Boggs entered separate dissents. (pe)

11/1/93 MANDATE ISSUED with no cost taxed [92-5591] (ds)

1/19/94 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Ed Plaut, et ux., et al. Filed in the Supreme Court on 01/11/94. Supreme Ct. case number: 93-1121. [92-5591] (swh)

6/10/94 U.S. Supreme Court order filed granting petition for writ of certiorari [889778-1] filed by Ed Plaut [92-5591]. Filed in the Supreme Court on 06/06/94. (swh)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 87-438

ED PLAUT, ET AL., PLAINTIFFS,

VS: ORDER

SPENDTHRIFT FARM, INC.,
ET AL. DEFENDANTS.

United States Magistrate Judge James F. Cook has recommended dismissal of the plaintiffs' claims under Section 10(b) of the Securities Exchange Act of 1934 as time-barred. [Record No. 176]. There being no objections to this aspect of Magistrate Judge Cook's recommended disposition of the case, *see Thomas v. Arn*, 474 U.S. 140 (1985), and being advised,

IT IS ORDERED herein as follows:

(1) That Magistrate Judge Cook's recommendation as to the disposition of the plaintiffs' Section 10(b) claims be, and the same hereby is, ADOPTED as that of the undersigned.

(2) That the plaintiffs' Section 10(b) claims be, and the same hereby are, DISMISSED with prejudice.

Magistrate Judge Cook also granted the plaintiffs leave to file a third amended complaint. [Record No. 176]. The defendant, Bateman Eichler, Hill Richards, Inc., has filed objections to this aspect of Magistrate Judge Cook's decision [Record No. 176].

The plaintiffs' third amended complaint restates their Section 10(b) claims. However, for the first time in this litigation which has been ongoing for almost four years, the plaintiffs seek to invoke this court's pending jurisdiction over Kentucky statutory and common law securities claims. [Record No. 169]. Magistrate Judge Cook recommended that the plaintiffs' Section 10(b) claims be dismissed with prejudice, but that the plaintiffs' state law claims be dismissed without prejudice. [Record No. 176].

The Court does not share Magistrate Judge Cook's belief "that the interests of justice require that the amendment be permitted in this action . . . " [Record No. 176, p. 5]. For one thing, the plaintiffs waited more than three years before asking this court to invoke its pendent jurisdiction over their state law claims. Thus, it is clear that the plaintiffs did not act with dispatch in doing so.

Second, the third amended complaint again raises Section 10(b) claims in the face of the Supreme Court's decision in *Lampf, Pleva, Lipking, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 59 U.S.L.W. 4688 (June 20, 1991), as well as potentially time-barred state law claims. *See, e.g., Hutton v. Bockweg*, 579 S.W.2d 382, 385 (Ky. App. 1979); *City of Owensboro v First U.S. Corporation*, 534 S.W.2d 789, 791 (Ky. 1975). Thus, it would serve no purpose to permit amendment where the amended complaint clearly will not withstand a motion to dismiss.[1] *See Martin Associated Truck Lines, Inc.*, 801 F.2d 246, 248 (6th Cir. 1986).

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[1] Indeed, the third amended complaint may violate Rule 11, Fed.R.Civ.P.

Accordingly,

IT IS ORDERED herein as follows:

(1) That the objections to Magistrate Judge Cook's Order permitting the filing of the third amended complaint be, and the same hereby are, SUSTAINED.

(2) That Magistrate Judge Cook's Order be, and the same hereby is, SET ASIDE.

(3) That the plaintiffs' motion for leave to file a third amended complaint be, and the same hereby is, DENIED.

This the 12th day of August, 1991.

s/Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service: 8/13/91

SUPREME COURT OF THE UNITED STATES

No. 93-1121

Ed Plaut, et ux., et al.,

Petitioners

v.

Spendthrift Farm, Inc., et al.,

Respondents

ORDER ALLOWING CERTIORARI. Filed June 6, 1994

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted limited to the following question: "Whether Section 27A(b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78aa-1, to the extent that it purports to require reinstatement of Section 10(b) actions dismissed with prejudice pursuant to judgments that became final prior to the enactment of Section 27A(b), contravenes the separation-of-powers doctrine or the Fifth Amendment Due Process Clause of the United States Constitution."

June 6, 1994

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(8)

No. 93-1121

In The

Supreme Court of the United States

October Term, 1994

ED PLAUT, NANCY McHARDY PLAUT, and JOHN GRADY, on behalf of themselves and all others similarly situated,

Petitioners,

v.

SPENDTHRIFT FARM, INC., BATEMAN EICHLER, HILL RICHARDS, INC., FRANCIS M. WHEAT, GIBSON, DUNN & CRUTCHER, DELOITTE HASKINS & SELLS, NORMAN D. OWENS, AMERICAN INTERNATIONAL BLOODSTOCK AGENCY, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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42 pp

QUESTION PRESENTED

The petition presents the following question:

"Whether Section 27A(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1, to the extent that it purports to require reinstatement of Section 10(b) actions dismissed with prejudice pursuant to judgments that became final prior to the enactment of Section 27A(b), contravenes the separation-of-powers doctrine or the Fifth Amendment Due Process Clause of the United States Constitution."

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 1 F.3d 1487, and reprinted in the Appendix to the Petition for a Writ of Certiorari ("Pet.App.") at 3a. The Memorandum Opinion and Order of the United States District Court for the Eastern District of Kentucky is reprinted in Pet.App. at 31a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[1] The judgment of the Court of Appeals for the Sixth Circuit was entered on August 3, 1993. The Petitioners' Motion for Rehearing En Banc was denied by order entered October 14, 1993. The Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit was filed January 11, 1994, and certiorari was granted on June 6, 1994.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves Article III and the Fifth Amendment to the United States Constitution.

Section 476 of the FDIC Improvement Act of 1991, Pub.L.No. 102-242, 105 Stat. 2236, 2387 (1991), codified as Section 27A of the Securities Exchange Act of 1934, 15

[1] The caption includes all parties to the case below.

U.S.C. § 78aa-1 ("Section 27A(b)"), provides in pertinent part:

> (b) Effect on dismissed causes of action.
>
> Any private civil action implied under section 78j(b) of this title that was commenced on or before June 19, 1991, –
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after Dec. 19, 1991.

STATEMENT OF THE CASE

Proceedings in the District Court

Beginning on November 22, 1983, Respondent, Spendthrift Farm, Inc., publicly offered and sold shares of its common stock to the Petitioners, and others. On November 20, 1987, the Petitioners filed this action in the United States District Court for the Eastern District of Kentucky, on behalf of themselves and all others similarly situated, seeking damages for securities fraud committed by the Respondents, who are the issuers, accountants, legal counsel, underwriter and experts involved in the public offering. The complaint alleges that the Respondents made false or misleading statements of material

fact in connection with the offering and sale of the securities, in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5.

Respondents filed a motion to dismiss, including a motion predicated on the alleged failure to comply with the three-year statute of limitations that had long been recognized by the Sixth Circuit as applying to private actions under Section 10(b).[2] The three-year period began to run when "the fraud is or should have been discovered."[3] Although the Petitioners' complaint was filed more than three years after the offering, the Magistrate Judge, to whom the case had been referred for pretrial rulings, found that the complaint was timely under the applicable law and, accordingly, recommended that the Motion to Dismiss on limitations grounds be denied. As of June 20, 1991, the District Court had not yet ruled on that recommendation.

On June 20, 1991, this Court decided *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) and *Beam Distilling Corp. v. Georgia*, 501 U.S. 529 (1991). In *Lampf* this Court held that the limitations period for private actions under Section 10(b) is found in Section 9(e)

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[2] Prior to the decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), the law in the Sixth Circuit provided that the statute of limitations for private actions under Section 10(b) filed in Kentucky was the three-year period contained in the Kentucky Blue Sky law. KY.REV.STAT. § 292.480 (Baldwin 1993).

[3] *See Herm v. Stafford*, 663 F.2d 669 (6th Cir. 1981); *Carothers v. Rice*, 633 F.2d 7 (6th Cir. 1980).

of the Securities Exchange Act, 15 U.S.C. § 78i(e). A securities fraud action, therefore, must be filed within the earlier of one year after discovery or three years after the fraud. 111 S.Ct. at 2782. The Court applied the new limitations period to the parties before it in *Lampf. Id.* On the same day, this Court held in *Beam* that, when a new judicial interpretation of the law is applied to the parties in the case in which it is announced, the new rule must be applied to all other pending cases. 111 S.Ct. at 2446, 2448.

On August 13, 1991, the District Court, applying *Lampf* and *Beam*, dismissed the Petitioners' complaint with prejudice. The Order of Dismissal is reprinted in the Joint Appendix ("J.App.") at 6. The Petitioners declined to file what the Sixth Circuit Court of Appeals noted would have been a "meritless and indeed sanctionable appeal." 1 F.3d at 1489; Pet.App. at 5a. The Order of Dismissal became final on September 12, 1991. 28 U.S.C. § 2107.

Three months later, on December 19, 1991, Congress enacted the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub.L.No. 102-242, 105 Stat. 2387 (1991). That Act amended the Securities Exchange Act by adding Section 27A(b), which provided a new statute of limitations for Section 10(b) claims pending on July 19, 1991. Section 27A(b) is a remedial provision designed to provide a new form of redress for thousands of defrauded plaintiffs who were unexpectedly deprived

of their day in court by the retroactive application of this Court's decision in *Lampf.*[4]

On February 11, 1993, Petitioners filed a timely Motion to Reinstate this action pursuant to Section 27A(b). Although the District Court specifically found that the complaint was timely under the pre-*Lampf* limitations period, it held that Section 27A(b) was unconstitutional as contravening the Fifth Amendment Due Process Clause and the separation of powers doctrine and, accordingly, denied the Motion to Reinstate. 789 F.Supp. 231, Pet.App. at 31a.

The Opinion of the Court of Appeals

The Court of Appeals affirmed. Despite vigorous urging by the Respondents, the Court of Appeals declined to base its ruling below on the "vested rights" doctrine.[5] Instead, it based its decision on what it found

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[4] Section 27A(a) provides a remedy for plaintiffs whose claims were pending on December 19, 1991. The constitutionality of Section 27A(a) is no longer in issue. *See, e.g., Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78 (2d Cir. 1993); *Cooke v. Manufactured Homes Inc.*, 998 F.2d 1256 (4th Cir. 1993); *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir. 1993); *Berning v. A.G. Edwards & Sons, Inc.*, 990 F.2d 272 (7th Cir. 1993); *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993); *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 1841 (1993); *Henderson v. Scientific-Atlanta*, 971 F.2d 1567 (11th Cir. 1992), cert. denied, ___ U.S. ___, 114 S.Ct. 95 (1993).

[5] "We do not base our decision primarily on this so-called 'vested rights doctrine,' despite its prominent separation of powers component, because the asserted ability of Congress to

to be an absolute constitutional rule that the final judgments of the federal courts are sacrosanct and utterly beyond the reach of Congress, based almost entirely on separation of powers principles. *See* 1 F.3d at 1493-94; Pet.App. at 13a-15a.

The Court first engaged in a lengthy discussion of the historical development of the separation of powers doctrine and a detailed analysis of *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). The Court drew from those historical antecedents and authorities the constitutional principle that "Congress may not retroactively [disturb, annul or vacate] final judgments of the Federal courts." 1 F.3d at 1493, 1499; Pet.App. at 13a, 26a. It found that rule to be absolute. "We believe the rule [that Congress may not retroactively disturb final judgments of the Federal Courts] to be not only alive but vital to the continuing integrity of the independent Federal judiciary; further, we believe no true exceptions to the rule exist." *Id.* at 1494; Pet.App. at 15a. Because it could not "square § 27A(b) with *Hayburn's Case*," *id.* at 1493; Pet.App. at 14a, and because it distinguished every other case in which Congress affected a final judgment, the Court of Appeals concluded that Section 27A(b) was an unconstitutional usurpation of the Judicial Power. *Id.*

Other Proceedings

This Court addressed the same issues raised by the instant petition in *Morgan Stanley & Co., Inc. v. Pacific*

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disturb rendered final judgments does not hinge on the nature of the judgment and its property value to the prevailing litigant, a central rationale of the vested rights doctrine." 1 F.3d at 1494 n.12, Pet.App. at 14a.

Mut. Life Ins. Co., ___ U.S. ___, ___ S.Ct. ___ (1994), in which it reviewed the decision of the Fifth Circuit Court of Appeals upholding the constitutionality of Section 27A(b).[6] The Fifth Circuit rejected the defendants' argument that Section 27A(b) violated their constitutional rights under the Fifth Amendment Due Process Clause, citing *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314-15 (1945). 997 F.2d at 49-50. The Court also declined the request to strike Section 27A(b) as an affront to the Article III Judicial Power under the separation of powers doctrine. It spurned the doctrinaire approach adopted by the Sixth Circuit, and held that Congress and the judiciary share the power to determine when "the judiciary's word on a controversy is its last." *Id.* at 55. This Court granted certiorari and affirmed the decision of the Fifth Circuit Court of Appeals in the *per curiam* opinion of an equally divided Court.[7]

A divided panel of the Court of Appeals for the Tenth Circuit, adopting much of the reasoning of the Court of Appeals for the Sixth Circuit in the opinion below, struck down Section 27A(b) on both separation of powers and due process grounds. *Johnson v. CIGNA Corp.*, 14 F.3d 486 (10th Cir. 1994). Judge Holloway filed a well-reasoned dissent in which he urged adoption of the analysis of the Fifth Circuit in *Pacific Mutual. Id.* at 497-502.

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[6] *See Pacific Mut. Life Ins. v. First Republicbank*, 997 F.2d 39 (5th Cir. 1993).

[7] ___ U.S. ___, ___ S.Ct. ___ (1994). Justice O'Connor took no part in the consideration or decision of the case.

SUMMARY OF THE ARGUMENT

Section 27A(b) was a valid exercise of the Legislative Power by a Congress determined to rectify the injustice visited upon the Petitioners, and others similarly situated, by the retroactive application of the decision in *Lampf*.

1. Separation of Powers Doctrine. The separation of powers doctrine, which protects and preserves the proper distribution of powers among the three coordinate branches of the government, is to be applied flexibly with a due regard to the powers and intentions of the other coordinate branches. The absolute rule adopted by the Sixth Circuit, that Congress may not retroactively disturb final judgments of the Federal Courts, does not comport with this Court's precedents or the flexible approach to the separation of powers doctrine contemplated by the Framers.

The principles in *United States v. Sioux Nation*, 448 U.S. 371 (1980), fully support the constitutionality of Section 27A(b). The argument that *Sioux Nation* merely stands for the principle that the government may waive the res judicata effect of prior favorable adjudications addresses issues under the Due Process Clause, not the separation of powers doctrine. *Sioux Nation* and the decisions upholding statutes reopening final judgments of the territorial courts and administrative bodies provide ample precedent that Section 27A(b) does not contravene the separation of powers doctrine.

The order of dismissal on limitations grounds in this case became "final" upon the expiration of the thirty-day period prescribed by Fed.R.App.P. 4, a rule promulgated

pursuant to legislative authority delegated by Congress to this Court. Congress had power to change the applicable limitations period before the thirtieth day. While the passage of the thirtieth day foreclosed an appeal by the parties, it did not absolutely and forever trammel the Legislative Power to make a political and policy judgment that the bar of limitations should be modified to afford an opportunity for an adjudication on the merits in accordance with the settled expectations of the parties prior to the decision in *Lampf*. The expiration of a time-period which is within the constitutional power of Congress to establish does not define the absolute and impregnable constitutional boundary of the Legislative Power in this area. Therefore, Congress does not contravene the separation of powers doctrine when it makes a political and policy judgment that a defined group of cases previously dismissed with prejudice on limitations grounds should proceed, regardless whether the parties still have a right to appeal.

Congress neither exercised nor impaired the Judicial Power by enacting Section 27A(b). It changed the law by establishing a new statute of limitations for private civil actions brought pursuant to Section 10(b) of the Securities Exchange Act that were pending on June 19, 1991. It did not set aside, annul, vacate, review or revise any prior judicial determination. It left all matters pertaining to the adjudication of all rights arising from Section 27A(b) exclusively to the courts. Therefore, Section 27A(b) was a valid exercise of the Legislative Power and does not contravene the separation of powers doctrine.

2. Due Process Clause. The test of due process under the Fifth Amendment Due Process Clause for the

retroactive aspects of legislation is whether the legislation advances a legitimate legislative purpose furthered by rational means. Section 27A(b) easily meets that test. Congress recognized the gross injustice visited upon the Petitioners and others similarly situated when their securities fraud claims were dismissed following the retroactive application of this Court's decision in *Lampf*. It was entirely legitimate for Congress, in the exercise of its power to regulate interstate commerce, to act to remedy that injustice and permit these cases to proceed to an adjudication on the merits. The means chosen were eminently rational. The procedural expedient of a motion to reinstate the dismissed actions, which Congress previously employed in *Sioux Nation*, conserved the resources of the parties and the judiciary.

Rights confirmed by an unappealable judgment are not absolute, nor should they be. If claims are sufficiently doubtful or disputed to result in litigation, they should not be stronger when determined and confirmed in a judgment than rights that are beyond dispute. Therefore, rights fixed in a judgment are not stronger or more vested for due process purposes than other property rights.

The amorphous "vested rights doctrine" is a relic, at least to the extent that it would render all final judgments absolutely sacrosanct. It should be formally rejected in favor of the more lucid due process analysis provided by the rationality test. Because Section 27A(b) easily passes the rationality test, it does not contravene the Fifth Amendment Due Process Clause.

ARGUMENT

I. SECTION 27A(b) DOES NOT CONTRAVENE THE SEPARATION OF POWERS DOCTRINE.

In an exercise of its power to regulate commerce among the several States, U.S. Const., art. I, § 8, Congress amended the Securities Exchange Act by enacting Section 27A(b) to create a statute of limitation for Section 10(b) claims that were pending on June 19, 1991. The amendment conferred a new limited right to have that defined class of securities fraud cases reinstated for further review and adjudication on the merits by the Judicial Branch. In enacting Section 27A(b), Congress did not review or revise the final judgments previously entered. It did not deprive the courts of the power or authority to finally determine the outcome of the reopened cases or prescribe a rule for their decision. Section 27A(b) affected final judgments in the same way as other statutes that have been upheld as legitimate exercises of the Article I Legislative Power. Accordingly, Section 27A(b) does not unduly impair the fundamental authority of the judiciary to decide cases and controversies and does not contravene the separation of powers doctrine.

A. The Expiration Of The Time To Appeal Orders Dismissing Actions On Limitations Grounds Does Not Extinguish The Legislative Power To Prescribe A Longer Limitations Period For Such Actions.

The separation of powers doctrine is vital to the very existence of our constitutional government. *Bowsher v. Synar*, 478 U.S. 714, 724 (1986); *Buckley v. Valeo*, 424 U.S. 1

(1976). This Court has recognized, however, that the Framers intended that the doctrine be applied practically and flexibly – not dogmatically – and with due regard for the powers and intentions of the other coordinate branches. *See Mistretta v. United States*, 488 U.S. 361, 380-81 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *Nixon v. Adminstrator of General Services*, 408 F.Supp. 321 *aff'd* 433 U.S. 425 (1977); *United States v. Nixon*, 418 U.S. 683 (1974). The doctrine does not require that the three branches be entirely separate and distinct or that they operate with absolute independence. *Mistretta v. United States* 488 U.S. at 379; *Morrison v. Olson*, 487 U.S. at 694; *see also Nixon v. Administrator of General Services*, 408 U.S. at 442 (citing James Madison in *The Federalist No. 47*, and Joseph Story in 1 *Commentaries on the Constitution* § 525 (M. Bigelow, 5th ed. 1905)). In the words of Justice Jackson, which frequently appear in this Court's opinions, "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (concurring opinion).

Congress' legislative purpose is central to the application of Madison's flexible approach to the doctrine. As the Court of Appeals recognized, the "separation of powers . . . is not offended so long as the actions of one branch do not involve *an attempt to increase the powers* of that branch at the expense of the powers of another branch or usurp or impermissibly undermine the powers properly belonging to another branch." 1 F.3d at 1499,

Pet.App. at 25a, citing *Mistretta* and *Morrison*. (Emphasis added.)

Whether legislation affects rights confirmed in a "final judgment" is not the touchstone of constitutionality under the separation of powers doctrine. The line between a case that is "pending" and a case in which an order of dismissal with prejudice has become "final," to which Section 27A(b) applies, is drawn by Fed.R.App.P. 4 and 28 U.S.C. § 2107(a).[8] If no notice of appeal is filed within the applicable time period after entry of a final order or judgment, the order or judgment becomes "final," in the sense that neither party has the right to seek further judicial review of the decision. It does not become "final" in the sense that on the last day of the period within which an appeal may be taken, Congress has full power to change the limitations period applicable to a case,[9] and on the next day it has none whatsoever. There is no constitutional significance, in a separation of powers analysis, to the expiration of a time period that is

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[8] Congress has the constitutional power to establish and prescribe rules of practice and procedure for the courts. U.S. Const. art. I, § 8, cl. 9; U.S. Const. art. III, § 2. Fed.R.App.P. 4, which was promulgated pursuant to statutory authority contained in 28 U.S.C. § 2072(a), prescribes the time periods within which a notice of appeal permitted as of right from an order of the district court must be filed. Section 2107(a) states, in pertinent part, "[N]o appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."

[9] See cases upholding the constitutionality of Section 27A cited in footnote 4.

within the Legislative Power to establish, particularly when that event purports to trammel the Legislative Power.

The separation of powers doctrine, and other constitutional provisions, not Fed.R.Civ.P. 4, provide the limits on the legislative power to reopen cases. It is unnecessary and unwise to undertake to formulate an abstract definition of those limits. Where Congress has made a political and policy judgment, however, that a defined class of cases should be permitted to proceed to an adjudication on the merits, Congress does not contravene the separation of powers doctrine when it acts to change the law to remove obstacles to an adjudication on the merits, just because the parties no longer have a right to appeal. The expiration of the time within which the parties may seek appellate review as of right does not establish the absolute and inviolable constitutional boundary for legislative power to modify a statute of limitations.[10] That is particularly true where, as here, the shortened limitations

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[10] "[Statutes of limitations] are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. (Citation omitted) They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945).

period on which the case was dismissed was announced by the judiciary.[11]

This Court has on several occasions rejected separation of powers attacks on legislation that embodied a political and policy judgment by Congress that certain cases that had been dismissed pursuant to final judgments should proceed. In *United States v. Sioux Nation*, 448 U.S. 371 (1980), this Court upheld the constitutionality of a 1978 statute directing an Article III court to reconsider *de novo* the merits of claims the lower court earlier had adjudged were barred by the doctrine of res judicata. The Court of Claims had ruled, in judgments which had become final, that claims asserted on behalf of Sioux Nation that the government had unlawfully taken the Black Hills region of the Great Sioux Reservation in violation of the Fifth Amendment were barred by the doctrine of res judicata.[12]

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[11] It is ironic that had Congress attempted to effect the same result as this Court's decisions in *Lampf* and *Beam*, this Court likely would have stricken the statute as contravening the Due Process Clause unless the statute afforded a reasonable time to commence an action before the bar of the shorter period took effect. *See Ochoa v. Hernandez Y Morales*, 230 U.S. 139, 161-62 (1913) (Limitations periods may be modified to shorten the period, "but only if this be done while the time is still running, and so that a reasonable time still remains for the commencement of an action before the bar takes effect.").

[12] *United States v. Sioux Nation*, 207 Ct.Cl. 234, 518 F.2d 1298 (1975). The Court of Claims held that the Sioux' taking claim was barred by the res judicata effect of its 1942 decision in *Sioux Tribe v. United States*, 97 Ct.Cl. 613 (1942), cert. denied, 318 U.S. 789 (1943).

In response to this perceived injustice, Congress passed a statute (the "1978 Amendment") directing the Court of Claims to review the Sioux taking claims on the merits without regard to the defenses of res judicata and collateral estoppel.[13] Acting pursuant to the 1978 Amendment, the Court of Claims reviewed the merits of the dispute and entered judgment in favor of the Sioux Nation. On appeal to this Court, the Government argued that the 1978 Amendment contravened the separation of powers doctrine because it impermissibly disturbed the finality of a judicial decree by rendering the earlier final judgments mere advisory opinions and because it effectively "reviewed and reversed" that court's earlier final judgments.

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[13] The statute, Pub.L. 95-243, 92 Stat. 153, amending section 20(b) of the Indian Claims Commission Act of 1946, 25 U.S.C. § 70s(b)(1976 ed., Supp. II), provided:

> Notwithstanding any other provision of law, upon application by the claimants within thirty days from the date of the enactment of this sentence, the Court of Claims shall review on the merits, without regard to the defense of res judicata or collateral estoppel, that portion of the determination of the Indian Claims Commission entered February 15, 1974, adjudging that the Act of February 28, 1877 (19 Stat. 254), effected a taking of the Black Hills portion of the Great Sioux Reservation in violation of the fifth amendment, and shall enter judgment accordingly. In conducting such review, the Court shall receive and consider any additional evidence, including oral testimony, that either party may wish to provide on the issue of a fifth amendment taking and shall determine that issue de novo.

This Court rejected those separation of powers attacks and upheld the constitutionality of the 1978 Amendment, stating:

> When Congress enacted the amendment directing the Court of Claims to review the merits of the Black Hills claim, it neither brought into question the finality of that court's earlier judgments, nor interfered with that court's judicial function in deciding the merits of the claim. When the Sioux returned to the Court of Claims following passage of the amendment, they were there in pursuit of judicial enforcement of a new legal right. Congress had not "reversed" the Court of Claims' holding that the claim was barred by res judicata, nor, for that matter, had it reviewed the 1942 decision rejecting the Sioux' claim on the merits. As Congress explicitly recognized, it only was providing a forum so that a new judicial review of the Black Hills claim could take place. This review was to be based on the facts found by the Court of Claims after reviewing all the evidence, and an application of generally controlling legal principles to those facts. For these reasons, Congress was not reviewing the merits of the Court of Claims' decisions, and did not interfere with the finality of its judgments.
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> * * *
>
> In sum, as this Court implicitly held in Cherokee Nation, Congress' mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States does not violate the doctrine of separation of powers.

448 U.S. at 406-07.

The Court of Appeals distinguished *Sioux Nation* on the basis of the identity of the parties. It read *Sioux Nation* to hold only that Congress may waive is own res judicata defense in the exercise of its power to pay the government's debts, and not that Congress may waive the res judicata defense for private litigants. That distinction, however, is relevant to a due process analysis, rather than a separation of powers analysis. The separation of powers analysis addresses whether Section 27A(b) encroaches on the Judicial Power, not on the nature of the rights affected.[14] The effect of Section 27A(b) and the 1978 Amendment with respect to the final judgments of both Article III courts was identical. The procedures for implementation selected by Congress were virtually identical. Both statutes involved rare instances in which Congress made a political and policy judgment that previously dismissed cases should be allowed to proceed.

A narrow reading of *Sioux Nation* also is inconsistent with this Court's rulings that separation of powers protections are not freely waivable. *See Commodities Futures Trading Comm'n v. Schor,* 478 U.S. 833, 851 (1986). This Court certainly would not have upheld the 1978 Amendment if it had believed that Congress' purpose was to increase its own powers at the expense of the Judicial Branch. *Cf. Id.* at 856. As it was, this Court knew that Congress' purpose was not to encroach on the Judicial Power, but to relieve injustice.

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[14] "[T]he asserted ability of Congress to disturb rendered final judgments does not hinge on the nature of the judgment and its property value to the prevailing litigant." *Plaut v. Spendthrift Farm,* 1 F.3d at 1494 n. 12; Pet.App. at 14a.

The separation of powers issue in this case is fully answered by the principles in *Sioux Nation,* but that case does not stand alone as precedent. This Court has repeatedly upheld statutes which affected final judgments on many other occasions for many reasons. *See Paramino Lumber Co. v. Marshall,* 309 U.S. 370 (1940); *Stephens v. Cherokee Nation,* 174 U.S. 445 (1899); *Freeborn v. Smith,* 69 U.S. (2 Wall.) 160 (1864); *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 59 U.S. (18 How.) 421 (1855); *Sampeyreac v. United States,* 32 U.S. (7 Pet.) 222, 239 (1833). *Cherokee Nation, Freeborn* and *Sampeyreac* all upheld legislation that affected rights fixed by final judgments of non-Article III territorial courts. None of those decisions, however, based its holding on any suggestion that final judgments of the territorial courts were less final that those of Article III courts.

Congress and the courts indeed "share"the power to say when the court's word on a particular controversy is its last, as the Fifth Circuit held in *Pacific Mut. Life Ins. v. First Republicbank,* 997 F.2d 39 (5th Cir. 1993). The absolute rule that final judgments are sacrosanct under the separation of powers doctrine, which was adopted by the Sixth Circuit in the opinion below, cannot be squared with this Court's prior decisions or the Constitution. Legislation affecting matters confirmed in judgments that have become final is not *ipso facto* invalid under the separation of powers doctrine, particularly when the legislation embodies a political and policy judgment that obstacles to the adjudication of a defined group of claims on their merits should be removed. The separation of powers analysis should focus on whether Congress' legislative purpose is to trammel or interfere with the fundamental

judicial power and authority to decide cases and controversies, and not on whether the period within which the parties may seek judicial review of the order of dismissal has expired. *See Commodities Futures Trading Comm'n v. Schor*, 478 U.S. at 856; *Bowsher v. Synar*, 478 U.S. at 727. Because of the myriad circumstances in which such separation of powers questions can arise, no bright lines can be drawn, and the determination must be made on a case-by-case basis. Rejection of a rigid and absolute rule honors the flexibility contemplated by the Framers and promotes the ability of this Court to dispense justice.[15]

B. Section 27A(b) Was A Valid Exercise Of The Article I Legislative Power.

1. Section 27A(b) Does Not Encroach Upon Or Impair The Judicial Power.

Section 27A(b) poses no threat to the Judicial Power or to the republic. It does not impair the fundamental

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[15] Congress' power to enact legislation affecting matters confirmed in final judgments obviously is limited, and this Court has not hesitated to strike down legislation which unduly threatens the Judicial Power to decide cases. Congress clearly cannot reverse results in particular controversies between private individuals. *See United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 648 (1875). It cannot pass prospective statutes that would have the effect of rendering final judgments mere advisory opinions. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). Retroactive legislation that "prescribe[s] a rule for the decision of a cause in a particular way" without changing in the underlying law is invalid. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1871).

power of the federal courts to decide cases or their ability to perform their essential judicial functions. To the contrary, Section 27A(b) represents a valid exercise of the Article I Legislative Power which fully respects and preserves the Article III Judicial Power.

There is no constitutionally significant distinction, in the context of the separation of powers analysis, between the operation of the 1978 Amendment on the final judgments of the Court of Claims in *Sioux Nation* and the operation of Section 27A(b) on the final judgment of the District Court dismissing the instant case. In neither case did Congress "[bring] into question the finality of [the] court's earlier judgments," *Sioux Nation* at 406, nor did it "interfere[] with [the] court's judicial function in deciding the merits of the claim," *id.*, nor did it "review or reverse" earlier judicial decisions. *Id.* The Petitioners, as did the Sioux, returned to court to enforce a new legal right pursuant to a procedure prescribed by Congress in the legitimate exercise of an enumerated legislative power. In both cases, Congress left the judicial functions of finding facts and applying the newly applicable law entirely to the judiciary.

Section 27A(b) has been variously characterized as "setting aside," "revising," "vacating" and "nullifying" the final judgments of the courts. A close examination of the actual effect of Section 27A(b) on the District Court's judgment in this case belies those characterizations. The District Court's Order of Dismissal embodied judicial determinations (i) that under *Lampf* and *Beam*, the applicable limitations period on August 13, 1991, was Section 9(e) of the Securities Exchange Act; (ii) that the Petitioners' complaint was not timely under Section 9(e); and

(iii) that, based on the law as the Court found it on August 13, 1991, the Respondents were entitled to an order granting their motions to dismiss. Section 27A(b) does not question, set aside, revise, vacate or nullify any of those judicial determinations. To the contrary, it respects and abides by them.

Had Congress not created new federal rights by prescribing a new limitations period, but simply "set aside" the judgments that the claims were time-barred under *Lampf* and *Beam*, this Court would not hesitate to strike such a statute on separation of powers grounds. Similarly, if this case had been adjudicated fully on the merits, with a jury verdict and final judgment in favor of the Petitioners, and if Congress had attempted to "set aside" that final judgment with instructions to enter judgment in favor of the Respondents, the result would be the same. *See United States v. O'Grady*, 89 U.S. (22 Wall.) 641, 648 (1875). Such is not the case with Section 27A(b).

Section 27A(b) changed the law. Congress conferred a new limited right on the Petitioners to make application to have their claims reinstated and adjudicated under the new limitations period Congress created on December 19, 1991. It did not "order" the court to reinstate the Petitioners' claims. It simply directed the Court to adjudicate claims presented to it which arise under federal law (Section 27A(b)) in the same sense that it directs the federal courts to adjudicate claims every time it creates a cause of action over which the federal courts have subject matter jurisdiction. Congress provided that, if the courts make a judicial determination that the applicants meet the statutory standard for relief, they will be entitled to proceed under the new statute of limitations.

Although Section 27A(b) clearly affected an order of dismissal on limitations grounds which subsequently became final, it did not nullify, revise or set the order of dismissal itself aside. As in *United States v. Sioux Nation*, Congress simply created a new limitations period, an area in which the Legislative Power is generally recognized as paramount, *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945), and a new right to a further judicial determination of the merits of the Petitioners' claims.

The enactment of Section 27A(b) did not constitute an exercise of the Judicial Power by Congress.[16] Congress did not find any facts, determine the application of Section 27A(b) to any case, attempt to award or reverse a judgment, grant a new trial, or interfere with the administration of justice. It changed the law and created a new right of action. All judicial functions relating to the adjudication of the new rights conferred by Section 27A(b) were left entirely and exclusively to the judiciary.

Section 27A(b) does not trammel the fundamental power and authority of the Judicial Branch to decide past, present or future cases and controversies. It did not constitute an exercise of the Article III Judicial Power. To the contrary, it constituted a valid exercise of the Article I Legislative Power. Therefore, Section 27A(b) does not contravene the separation of powers doctrine.

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[16] The judicial power necessarily involves adjudication – undertaking to "determine facts, apply a rule of law to those facts, and thus arrive at a decision" – these bring "necessary . . . conditions for the exercise of federal judicial power." *Freytag v. Commissioner*, 501 U.S. 868 (1991).

2. Section 27A(b) Does Not Violate The Principle Of Hayburn's Case.

The Respondents' separation of powers argument, which was adopted in the opinion below, rests entirely on *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) and its historical antecedents. The Sixth Circuit cited *Hayburn's Case* as standing for the principle that "Congress may not retroactively disturb final judgments of the Federal courts," 1 F.3d at 1493, Pet.App. at 13a, and held that Section 27A(b), by allowing Congress to sit as a "court of errors," was an impermissible exercise of the Judicial Power.

The problem in *Hayburn's Case* arose after Congress enacted a 1792 statute which provided that disabled Revolutionary War veterans could seek federal pensions by making application to the circuit court. The Court would make findings regarding whether the applicant was a veteran and disabled, certify to the Secretary of War that the applicant was entitled to a pension, and render an opinion regarding the applicant's degree of disability. The statute, however, empowered the Secretary of War to withhold the applicant's name from the pension list for various reasons, and to report to Congress if he had reason to suspect "imposition or mistake." Section 4, 1 Stat. 244. The statute therefore subjected the circuit courts' decisions to discretionary review or suspension by the Secretary of War and Congress.

Hayburn's Case became moot[17] before the constitutionality of the pension statute came before this Court.

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[17] The provision at issue was repealed before it could be considered by this Court. *See* 2 U.S. (2 Dall.) at 408; Act of Feb. 28, 1793, ch. 17, 1 Stat. 324.

Nevertheless, five Justices, in their capacity as circuit judges, expressed their views on the validity of the statute in letters to President Washington.[18] Chief Justice Jay and Justice Cushing addressed this separation-of-powers issue, and stated that

> by the constitution . . . the government . . . is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either . . . neither the secretary of war, nor any other executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.

2 U.S. (2 Dall.) at 410-411. Other constitutional concerns involved the justiciability of proceedings under the pension statute. The Justices expressed the view that the business directed by the statute was "not of a judicial nature," and therefore, the circuit courts could not proceed as Article III courts.[19]

Hayburn's Case, and its progeny, primarily address the justiciability of cases and controversies as to which, because of existing legislation, the courts are unable to provide final relief. The separation of powers principle stated in *Hayburn's Case* is that Congress may not enact a

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[18] The letters are collected in a note to *Hayburn's Case*, 2 U.S. (2 Dall.) at 410-414.

[19] 2 U.S. (2 Dall.) at 411. This was an early expression of the Court's refusal to issue advisory opinions. "A judicial declaration subject to discretionary suspension by another branch of government may easily be characterized as an advisory opinion." 13 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3529.1 at 302 (1984).

statute which impairs the ability of the courts to decide a class of future controversies by subjecting its judgments to subsequent review and revision. It does not establish a constitutional principle that "Congress may not retroactively disturb final judgments of the Federal courts," as the Court of Appeals found.

Section 27A(b) offends neither the separation of powers nor the justiciability principles of *Hayburn's Case*. Congress did not sit as a "court of errors" when it passed Section 27A(b), nor did it direct business of a non-judicial nature to the courts. *Hayburn's Case* simply provides no authority for the Respondents.

Congress enacted Section 27A(b) in a valid exercise of the enumerated power to regulate interstate commerce. Although the affected orders of dismissal were "final" in the sense that the time within which the parties could seek appellate review as of right had expired, Section 27A(b) did not set aside, annul or vacate any judicial determination. It conferred new legal rights, but left the application of the new law to the facts, and all other judicial functions, to the courts. Therefore, Section 27A(b) does not encroach upon or impair the Judicial Power and does not contravene the separation of powers doctrine.

II. SECTION 27A(b) DOES NOT CONTRAVENE THE FIFTH AMENDMENT DUE PROCESS CLAUSE.

Section 27A(b) clearly passes muster under the test of due process by which the constitutionality of retroactive legislation is measured and, therefore, it did not deprive the Respondents of any property or rights in violation of the Fifth Amendment Due Process Clause.

A. Section 27A(b) Furthered A Legitimate Legislative Purpose By Rational Means.

The test of due process against which retroactive legislation is measured is well established. "[T]he test of due process" for the "retroactive aspects of [economic] legislation, as well as the prospective aspects," is whether they advance "a legitimate legislative purpose furthered by rational means." *General Motors Corp. v. Romein*, 112 S.Ct. 1105, 1112 (1992), quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). *See also United States v. Sperry Corp.*, 493 U.S. 52, 64-65 (1989); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) ("legislation . . . is not unlawful solely because it upsets otherwise settled expectations"). The due process concern addressed by the rationality test is that retroactive legislation presents greater problems of unfairness because "it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 112 S.Ct. at 1112.

Section 27A(b) easily meets that standard. Few, if any, question the injustice visited on the Petitioners by the wholly unexpected change in the limitations period governing the adjudication of securities fraud claims on their merits.[20] The removal of that procedural obstacle was an

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[20] "*Lampf* changed the rules in the middle of the game for thousands of fraud victims who already had suit pending – applying a shorter statute of limitations than when they brought their suits. The Supreme Court's decision in Lampf, June 20, 1991, in effect frees Michael Milken and scores of other felons and defendants of responsibility to pay back the people they have swindled. . . . All we seek is to give the victims a fair day in

entirely legitimate legislative purpose, which served the public interest[21] as well as the private interests of thousands of defrauded investors whose legitimate expectations were upset by the Court's decision in *Lampf*.

The means chosen by Congress were entirely rational. Rather than burdening litigants with the task of initiating entirely new actions and the courts with having to process those new actions back to their procedural postures on June 19, 1991, Congress devised the procedural expedient of the motion to reinstate – the same procedure Congress specified in the 1978 Amendment, which was upheld in *Sioux Nation*. That procedural mechanism conserved judicial resources and prevented further unnecessary delay and expense in the resolution of these cases on the merits.

Section 27A(b) also is entirely consistent with the due process concern addressed by the rationality test – the preservation of the settled expectations of the parties. Far from upsetting the settled expectations of the parties, Section 27A(b) restored them.[22] Because Section 27A(b)

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court." 137 Cong.Rec. S18624 (daily ed. November 27, 1991) (Sen. Bryan).

[21] This Court has recognized the desirability of private enforcement of the securities laws as a supplement to SEC action. *See Grace v. Ludwig*, 484 F.2d 1262, 1267 (2d Cir.) cert. denied, 416 U.S. 905 (1974), *citing J. I. Case v. Borak*, 377 U.S. 426 (1964). *See also, Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972).

[22] It was this Court's decision in *Lampf* that upset the settled expectations of all of the parties at the time this action was filed. Section 27A(b) had the effect of restoring and protecting – not upsetting – those settled expectations. Therefore, the due

embodied a legitimate legislative purpose furthered by rational means, it meets the constitutional test of due process, and therefore, does not contravene the Fifth Amendment Due Process Clause.

B. Section 27A(b) Does Not Deprive Respondents Of Property Or Rights In Violation Of The Fifth Amendment Due Process Clause.

The Respondents cannot claim a property interest in the final judgment that is any stronger than other property rights recognized by the law. Moreover, to the extent Section 27A(b) deprived the Respondents of any property, it nevertheless did so under circumstances and in a manner that passes the due process test under the Fifth Amendment Due Process Clause.

1. The Respondents' Interest In The Judgment Is Entitled To No Greater Protection Than Other Property Rights.

Whatever rights may accrue to a party as the result of the entry of a final judgment clearly are not absolute. A final judgment is "final" in the sense that it is a judicial determination as to which there is no further right to seek appellate review. It is not "final" in the sense that the rights fixed by it are graven in stone absolutely and forever. The courts have the power and authority to set aside their own final judgments pursuant to Fed.R.Civ.P. 60(b), thereby divesting the parties of the rights flowing

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process concern that generally subjects retroactive legislation to scrutiny is simply not raised by Section 27A(b).

from a judgment. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988). While the discretion of a Court to set aside a judgment under Rule 60(b) is not without limits, the very existence of that power negates any argument that property rights a party may have in a final judgment are sacrosanct or enjoy absolute constitutional protection. Similarly, in the exercise of the Legislative Power, Congress may create new rights which change or dilute rights fixed in a final judgment, provided the retroactive legislation passes the due process rationality test. *See General Motors Corp. v. Romein*, 112 S.Ct. 1105, 1112 (1992), quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984).

Far from being absolute, rights in a final judgment are no stronger or more vested for due process purposes than other property rights, such as rights under a contract or title to real property. As this Court stated in *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947), "rights acquired by judgments have no different standing" for due process purposes than other rights. That is logical. When property rights are sufficiently doubtful or disputed that they become the subject of litigation, there is no reason why those underlying property rights, when determined and confirmed in a final judgment, should be any stronger or entitled to greater constitutional protection than underlying property rights that are sufficiently clear to be beyond dispute.[23]

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[23] A judgment clearly gives rise to additional rights, such as the right to a judicial lien and the right to mandatory process to enforce it. While those additional rights flow from the judgment, they do not confer a greater property interest in the judgment itself or enhance the underlying property rights on which it is predicated.

Because a final judgment does not confer property rights that are entitled to greater protection for due process purposes than other property rights, Congress may enact legislation affecting rights under final judgments so long as the legislation meets the due process rationality test described above.

2. Section 27A(b) Did Not Divest Respondents Of Property In Violation Of The Due Process Clause.

The Court of Appeals clearly stated that the primary basis of its decision was the separation of powers doctrine and not what it refered to as "this so-called 'vested rights doctrine.' " 1 F.3d at 1497 n.12, Pet.App. at 14a. The Court appears to denigrate the vested rights doctrine, as applied to this case, by affirming Congress' traditional legislative power to amend, repeal, or even extend statutory time limits, and observing that "[w]here Congress changes or supersedes such time limits, no litigant can properly assert a continuing or vested right to the old time limit," 1 F.3d at 1495, Pet.App. at 18a, citing *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801); *Campbell v. Holt*, 115 U.S. 620 (1885); and *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). The court, however, stated that, at least as a general matter, *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898), the origin of the vested rights doctrine, is still good law. Subsequent cases and doctrinal developments, however, call its general

value as precedent in a due process analysis of the constitutionality of retroactive legislation into serious question.[24] That is particularly true as the doctrine is applied to the facts of this case.

The Fifth Amendment Due Process Clause was considered the source of the constitutional protection of the judgment which gave rise to the "vested rights" in *McCullough. Hodges v. Snyder,* 261 U.S. 600, 602 (1923). This Court, however, has since criticized the use of the words "vested right" to describe constitutionally protected property rights.

> [T]he words "vested right" are nowhere used in the constitution, neither in the original instrument nor in any of the amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact

[24] It is important to segregate the separation of powers analysis from the due process analysis when considering the constitutionality of Section 27A(b). If legislation violates the separation of powers doctrine, then a party's interest in the final judgment is "vested," not by virtue of any *property* interest he possesses in the judgment, but by virtue of constitutional limitations on the Article I Legislative Power. Conversely, if legislation affecting matters adjudicated to a final judgment is within the Legislative Power, under the separation of powers doctrine, only then arise the issues of (i) the nature and extent of any property interest the Respondents may have in a final judgment and (ii) whether the legislation deprives them of that interest in violation of the Fifth Amendment Due Process Clause.

> term, as the phrase itself is not one found in the language of the constitution.

Campbell v. Holt, 115 U.S. 620, 628 (1885).

Furthermore, the principle that the Due Process Clause absolutely protects all final judgments from retroactive legislation, if it ever existed, is no longer valid. In *Fleming v. Rhodes,* 331 U.S. 100 (1947), landlords had obtained final judgments in Texas state court permitting them to evict their tenants after wartime price regulations had lapsed. Congress subsequently enacted legislation curing the lapse and prohibited the eviction of tenants. A price control administrator sought injunctions against the landlords and state officials from executing on their judgments. The District Court held that the statute violated the Fifth Amendment Due Process Clause. This Court reversed and held that Congress could protect housing in defense areas "notwithstanding these prior judgments." 331 U.S. at 107. While the legislation in *Fleming* did not "set aside" final judgments, it did for all practical (and due process) purposes "nullify" them by precluding the prevailing parties from enforcing them. *See Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 313 (1945) ("[I]t is troublesome to sustain as a right a claim that can find no remedy for its invasion."). Whatever "rights" the landlords had in their judgments were rendered worthless (nullified) by the price control legislation.[25]

[25] *See also Federal Housing Admin. v. Darlington, Inc.,* 358 U.S. 84, 91 n.6 (1958) ([A]ny "vested" rights by reason of the state judgment were acquired subject to the possibility of their dilution through Congress' exercise of its paramount regulatory power.)

There is nothing unique or different about property rights confirmed in final judgments that excepts them from the generally applicable due process rationality test discussed above. Since Congress has the power to dilute or impair rights arising from final judgments by retroactive legislation, so long as it passes the rationality test, whatever "vested rights" a party may have in a final judgment simply are not vested absolutely. Because Section 27A(b) passes constitutional muster under the rationality test, the dilution or withdrawal by Congress of whatever "vested rights" the Respondents may have had in their final judgments of dismissal on limitations grounds did not contravene the Fifth Amendment Due Process Clause.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be reversed.

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Dated: July 20, 1994.

No. 93-1121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ED PLAUT, *et al.*,

Petitioners,

v.

SPENDTHRIFT FARM, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

Whether Section 27A(b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78aa-1, to the extent that it purports to require reinstatement of Section 10(b) actions dismissed with prejudice pursuant to judgments that became final prior to the enactment of Section 27A(b), contravenes the separation-of-powers doctrine or the Fifth Amendment Due Process Clause of the United States Constitution.

LIST OF PARTIES

In addition to petitioner named in the caption, Nancy McHardy Plaut and John Grady were appellants in the court below and are petitioners here. The United States intervened pursuant to 28 U.S.C. § 2403(a). In addition to respondent named in the caption, the following parties were appellees in the court below and are respondents here: Kemper Securities, Inc. (formerly Bateman Eichler, Hill Richards, Inc.), Francis M. Wheat, Gibson, Dunn & Crutcher, Deloitte & Touche (formerly Deloitte, Haskins & Sells), Norman D. Owens, and the American International Bloodstock Agency, Inc. Respondents incorporate the Rule 29.1 disclosures concerning parent and subsidiary corporations contained in their respective responses to the certiorari petition.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves § 27A of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78aa-1 (Supp. IV 1992), which is reproduced in full in the Appendix to this Brief. It also involves § 10(b) of the 1934 Act, 15 U.S.C. § 78j(b)(1988); Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 (1994); Articles I and III of the Constitution of the United States; and the Due Process Clause of the Fifth Amendment to the Constitution, which are reprinted in pertinent part in the Appendix.

STATEMENT OF THE CASE

This case involves the constitutionality of a congressional enactment that requires the reopening of final judgments of Article III courts in order to reverse the effect of two decisions of this Court on cases that were pending on the date of those decisions.

A. Proceedings Prior To The *Lampf* And *Beam* Decisions

Petitioners commenced this action in the United States District Court for the Eastern District of Kentucky on November 20, 1987, alleging that respondents committed violations of § 10(b) and Rule 10b-5 in connection with purchases by petitioners in 1983 and 1984 of shares of stock of respondent Spendthrift Farm, Inc. In January and February, 1988, respondents filed motions to dismiss the complaint on the ground, *inter alia*, that it was barred by the three-year statute of limitations borrowed from the Kentucky state securities laws. The district court placed the motions in abeyance pending this Court's decision in

Lampf, Pleva Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773 (1991).[1]

B. The *Lampf* And *Beam* Decisions

On June 20, 1991, this Court rendered its decision in *Lampf*. The Court held that the private right of action that had been implied by courts from § 10(b) is subject to the "1-and-3-year" statute of limitations governing express remedies enacted by the 73rd Congress along with § 10(b) as part of the 1934 Act. After acknowledging that § 10(b) private claims "are of judicial creation," 111 S. Ct. at 2779, and that "we have made no pretense that it was Congress' design to provide the remedy afforded," *id.* at 2780, this Court defined its "awkward task" as that "of discerning the limitations period that Congress intended courts to apply to a cause of action it really never knew existed," *id.* The Court concluded that "[w]e can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related provisions." *Id.* Accordingly, the Court approved the rule that had been adopted by three

[1] While its motion to dismiss was pending, respondent Deloitte & Touche (then Deloitte, Haskins & Sells) filed a supplemental memorandum arguing that the action was time-barred under the uniform federal "1-and-3-year" statute of limitations that had been held to apply to § 10(b) claims by the Third Circuit in *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537 (3d Cir.), *cert. denied*, 488 U.S. 849 (1988). *See* Supp. Mem. In Support Of Defendant Deloitte, Haskins & Sells' Motion To Dismiss (Aug. 2, 1988). Deloitte & Touche argued that "*Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), which in turn builds on *Wilson v. Garcia*, 471 U.S. 261 (1985), and *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), raises considerable doubt regarding the courts' practice of applying a state statute of limitations to federal securities claims under Section 10(b)." *Id.* at 3.

federal courts of appeals[2] and rejected inconsistent lower court decisions that had applied state-law limitation periods to § 10(b) claims. Because the *Lampf* plaintiffs had filed their complaint more than three years after the defendants' alleged misrepresentations, the Court held that their claims were untimely. *Id.* at 2782.

On the same day it decided *Lampf*, this Court also decided *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 111 S. Ct. 2439 (1991). *Beam* held that similarly situated litigants must be treated the same and that, therefore, a rule of law articulated by this Court and applied to the parties before the Court is equally applicable in all pending cases raising the same issue. Thus, under *Beam*, the Court's construction of § 10(b) in *Lampf* governed all cases pending at the time, including the case at bar. This Court's subsequent issuance of its mandates in *Lampf* and *Beam* effectively terminated the substantive legal rights of the *Lampf* plaintiffs and all other plaintiffs similarly situated, and those mandates did so with the same decisiveness and finality that have been the hallmarks of the Article III judicial function for over two centuries.

C. Congressional Reaction To *Lampf* And *Beam*, And The District Court's Entry Of Final Judgment In This Case

In response to the *Lampf* and *Beam* decisions, two proposals were introduced in Congress in the summer of 1991 to amend the 1934 Act and replace the 1-and-3-year *Lampf* statute of limitations with new, longer limitation periods for § 10(b) actions. Senator Bryan introduced S. 1533, which would have established a 2-and-5-year limitation period for "any private right of action" under the

[2] *See Ceres Partners* v. *GEL Assocs.*, 918 F.2d 349 (2d Cir. 1990); *Short* v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991); *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537.

1934 Act. *See* S. 1533, 102d Cong., 1st Sess. (1991); 137 Cong. Rec. S10,675-76, S10,691-92 (daily ed. July 23, 1991) (statement of Sen. Bryan). In August, Representative Markey introduced H.R. 3185, which proposed a 3-and-5-year limitation period. *See* H.R. 3185, 102d Cong., 1st Sess. (1991); 137 Cong. Rec. E2,843 (daily ed. Aug. 2, 1991) (statement of Rep. Markey). Both S. 1533 and H.R. 3185 provided for application of a longer limitation period to cases pending when *Lampf* and *Beam* were decided.

On August 13, 1991, the district court in this case, following the requirements of *Lampf* and *Beam*, held that petitioners' § 10(b) claims were time-barred. The court dismissed the complaint with prejudice and entered final judgment for respondents. Joint App. 6. Although S. 1533 and H.R. 3185 were pending in Congress, petitioners did not file post-judgment motions to alter, amend or modify the judgment dismissing their case, nor did they file a notice of appeal. The thirty-day period for filing a notice of appeal expired on September 12, 1991.[3]

H.R. 3185 did not emerge from committee. The Senate Committee on Banking, Housing and Urban Affairs, however, added S. 1533 as an amendment to a major pending bill, S. 543, that addressed totally unrelated subject

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[3] Petitioners and the United States assert that an appeal would have been sanctionable. *See, e.g.*, Pet. Br. at 4; U.S. Br. at 3 n.1. *Lampf*, however, was a five-to-four decision, and *Beam* was decided by a divided Court with five separate opinions. The Commonwealth of Virginia challenged the *Beam* holding all the way to this Court without incurring sanctions. *Harper* v. *Virginia Dept. of Taxation*, 113 S. Ct. 2510 (1993). There is no available information to indicate that any § 10(b) plaintiff has been sanctioned for challenging the retroactive application of *Lampf*. *See generally* A. Sabino, *A Statutory Beacon or a Relighted* Lampf? *The Constitutional Crisis of the New Limitary Period For Federal Securities Law Actions*, 28 Tulsa L. Rev. 23, 61-65 (1992) (arguing that *Lampf* should not be applied retroactively).

matter -- the refunding and reform of the Federal Deposit Insurance Corporation ("FDIC"). *See* S. Rep. No. 167, 102d Cong., 1st Sess. 205-06, 522-23 (1991). In the subsequent floor debate on S. 543, Senator Bryan's proposal -- incorporated as § 1126 of the FDIC bill -- encountered substantial resistance. For example, Senator Domenici and others argued that the Senate should not adopt § 1126 except as a part of a broader litigation reform package addressing and controlling frivolous and abusive securities litigation. *See* 137 Cong. Rec. S16,469-76, S16,504-07, S16,509-S16,609 (daily ed. Nov. 13, 1991); *see also* 137 Cong. Rec. S17,001, S17,033-34, S17,036-37 (daily ed. Nov. 19, 1991).

The supporters of the 2-and-5-year limitation period were unable to muster sufficient support to preserve its inclusion in S. 543. However, the Senate changed § 1126 on November 21, 1991, substituting language that, with slight modification, would eventually become § 27A. *See* 137 Cong. Rec. S17,315 (daily ed. Nov. 21, 1991). In this version, the effort to legislate a new, longer statute of limitations for § 10(b) claims was abandoned, but § 1126 nonetheless required "the *Lampf* decision to be set aside so there would, in fact, be a legal reachback to cover cases" pending at the time that *Lampf* was decided. *Id.* at. S17,306 (statement of Sen. Riegle).

The House passed its version of the FDIC reform bill, H.R. 3768, on the same day. *See* H.R. 3768, 102d Cong., 1st Sess. (1991). The House bill did not contain a provision relating to § 10(b).

During the subsequent debate on S. 543 and H.R. 3768, the provision that ultimately became § 27A was urged because *Lampf* and *Beam* had "resulted in dismissal of many currently pending private Rule 10b-5 actions against Charles Keating, Michael Milken and other figures," 137 Cong. Rec. H11,811 (daily ed. Nov. 26, 1991) (statement of Rep. Dingell), and because "fraud claims, including those against Milken, Keating and Fred Carr, are

threatened with pending dismissal motions solely as a result of *Lampf*," *id.* at H11,812 (statement of Rep. Markey). Section 27A's supporters perceived the *Lampf* decision to be "ill-considered," *id.*, and a "mistake," 137 Cong. Rec. at S18,624 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan).

Refunding the nearly insolvent FDIC was an urgent necessity on November 26, 1991, when the House and Senate Conference Committee convened to reconcile the two bills. As a result, the Conference Committee met throughout the night, agreeing to a bill just before dawn on November 27, 1991. *See* 137 Cong. Rec. H11,760-813 (daily ed. Nov. 26, 1991); 137 Cong. Rec. at S18,617-26 (daily ed. Nov. 27, 1991); L. Gruson, *D'Amato Wins in Effort for Charities*, N.Y. Times, Nov. 28, 1991, at B1. This bill was enacted as the 157-page FDIC Improvement Act of 1991 ("FDICIA"), *see* Pub. L. No. 102-242, 105 Stat. 2236 (1991), and included a provision, § 476, that was ultimately codified as § 27A of the 1934 Act. FDICIA related almost exclusively to the FDIC. The President signed FDICIA into law on December 19, 1991.

D. Provisions Of § 27A

Section 27A has two parts. Part (a) applies to "**pending causes of action.**" It states that for pending § 10(b) cases that were also pending on June 19, 1991, the statute of limitations shall be the "period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991."

Part (b) applies only to "**dismissed causes of action.**" It requires that a § 10(b) action pending on June 19, 1991 "shall be reinstated" if it was "dismissed as time barred subsequent to June 19, 1991," and "would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991."

Section 27A was unmistakably intended by its proponents to "overturn[ ]" what certain Members of Congress considered to be "the most egregious part of the [*Lampf*] decision," 137 Cong. Rec. at S18,623 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan), by directing courts, in the § 10(b) cases that were pending on June 19, 1991, to set aside the rule of decision required by *Lampf* and *Beam* and to apply the rule of decision explicitly rejected in *Lampf*, even if it meant reopening dismissed cases. Indeed, even if the legislative history were devoid of these statements as to the purpose of § 27A, the text of that provision would, and does, speak for itself: Because Congress could not reach a majoritarian consensus to change the statute of limitations applicable to § 10(b) cases filed after June 19, 1991, Congress confined its intervention to keeping alive or resuscitating those § 10(b) cases that had been filed on or before June 19. Congress even intended for courts to apply "interpretative principles such as retroactivity and equitable tolling," *id.* at S18,624, that this Court explicitly rejected in *Lampf* and *Beam*.

Section 27A has no effect on the statute of limitations for § 10(b) cases commenced after § 27A's enactment, or even for cases that were filed after the *Lampf* decision but before § 27A was enacted into law. The current statute of limitations for § 10(b) cases is just as *Lampf* decided; it was left unchanged by § 27A: "[W]e resolved [that] issue by *not* extending the statute of limitations on 10(b) type of litigation." 137 Cong. Rec. S17,309 (daily ed. Nov. 21, 1991) (statement of Sen. Domenici) (emphasis added).

E. Proceedings Below After Enactment Of § 27A

On February 11, 1992, petitioners filed a motion asking the district court to reinstate their § 10(b) claims pursuant to § 27A(b). On April 13, 1992, the district court denied petitioners' motion, holding that § 27A(b) contravenes both the constitutional separation of powers and the Due Process Clause of the Fifth Amendment. Pet. App. 33a-39a.

On August 3, 1993, the Sixth Circuit affirmed the district court's denial of petitioners' motion to reinstate, holding that § 27A(b) violates the separation-of-powers doctrine. Pet. App. 5a-27a.[4] After analyzing the principles reflected in decisions of this Court dating back to *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792), the Sixth Circuit concluded that "the Supreme Court has from the beginning maintained the rule that Congress may not retroactively disturb final judgments of the Federal courts." Pet. App. 13a. The court stated that "[w]e search in vain for an instance where the courts have permitted Congress retroactively to disturb final judgments rendered in cases between private litigants." *Id.* To hold that Congress enjoys such a power, the court concluded, would clash with traditional understanding of "the fundamental natures of the legislative and judicial powers," *id.* at 14a, and "render the whole function of the judiciary futile," *id.* at 25a.[5]

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[4] The court below did not reach the due process question because it determined that "the asserted ability of Congress to disturb rendered final judgments does not hinge on the nature of the judgment and its property value to the prevailing litigant." Pet. App. 14a n.12.

[5] The Tenth Circuit has also declared § 27A(b) unconstitutional, holding that it violates both the separation of powers and the Fifth Amendment Due Process Clause. *See Johnston* v. *CIGNA Corp.*, 14 F.3d 486 (10th Cir. 1993), *pet. for cert. pending* (No. 93-1723). The Second Circuit questioned the constitutionality of § 27A(b) as applied to final judgments, but found it unnecessary to resolve the issue on the facts before it. *See Axel Johnson, Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 83-84 (2d Cir. 1993). Only one court of appeals, the Fifth Circuit, has upheld the constitutionality of § 27A(b) as applied to final judgments. *See Pacific Mut. Life Ins. Co.* v. *First Republicbank Corp.*, 997 F.2d 39 (5th Cir. 1993), *aff'd by an equally divided court sub nom. Morgan Stanley & Co.* v. *Pacific Mut. Life Ins. Co.*, 114 S. Ct. 1827 (1994).

SUMMARY OF ARGUMENT

Section 27A raises substantial constitutional questions concerning the power of Congress to set aside final judgments of Article III courts and to substitute congressional rules of decision for judicial judgments in closed cases. Those constitutional issues may, however, be avoided by two alternative constructions of § 27A that are entirely consistent with the language of § 27A and the teachings of this Court.

First, § 27A directs that courts render decisions based upon statutes of limitations as they existed in various jurisdictions on June 19, 1991. On June 20, 1991, this Court announced the statute of limitations for § 10(b) cases, and that decision declared not only what the law was on June 20, but what the law was on June 19 as well. The Court did not invent the 1-and-3-year § 10(b) limitation period on June 20; it found that that was the correct limitation period and the one that the 73rd Congress would have imposed in 1934 when § 10(b) was enacted. In short, the Court declared what the law was then and had been, not what it would be from that point forward. Whatever its proponents' intentions, § 27A contains language that requires only that courts apply the law as this Court found it to be. This construction is consistent both with § 27A's literal meaning and this Court's jurisprudence, and would make review of the constitutional issues in this case unnecessary.

Second, § 27A(b) applies by its terms to dismissed cases. It does not, however, by its terms apply to cases in which *final* judgments of dismissal have been entered. If § 27A(b) is construed not to reach completely closed cases, and there is nothing in the language or history of § 27A(b) to suggest otherwise, the constitutional implications of § 27A(b) need not be reached in this case.

If the constitutional dimensions of § 27A must be addressed, the issues it raises are exceedingly serious. The congressional mechanism created by § 27A threatens the

Constitution's defining structural principle. "No political truth" was more central to the Constitution's structure than the division of governmental power among the three Branches. Nothing in the Constitution carries greater weight than the restraints the Framers imposed to prevent one Branch from exercising the central functions of another Branch or revising that other Branch's exercise of its own functions.

The Framers were particularly concerned that, because of its enterprising ambition and extensive powers, the Legislative Branch would threaten the powers of the other Branches. By the same token, the Judicial Branch was perceived as the weakest of the three Branches, and therefore the most in need of protection from encroachment by the factional impulses of Congress.

The Framers accordingly carefully separated judicial and legislative powers, and they knew about, discussed and intentionally denied Congress the power to reverse or revise judicial decisions. The Legislature's broad power to enact rules of conduct did not include the power to intrude on the Judiciary's exclusive power to render final decisions in cases and controversies between private litigants.

The Justices of this Court made it clear early in the Nation's history that the courts could not be made into advisory bodies by making their decisions subject to executive or legislative revision. The Court also made it clear over a century ago that Congress does not have the power to impose rules of decision on the courts in ways that interfere with the Judiciary's ability to declare what the law is.

Section 27A is incompatible with the intentions of the Framers, the structure of the Constitution, and the precedents of this Court. Section 27A is not an exercise of the legislative power in any traditional or recognizable sense. It does not announce a new statute of limitations. It does not prescribe a rule that governs future or even past conduct. It operates only to mandate the application of a

particular rule of decision in cases in which a contrary rule of decision has already been prescribed by this Court and implemented by inferior federal courts otherwise bound to follow this Court's rulings. In short, it revises and therefore renders advisory a judgment and mandate of this Court in a fashion that, until § 27A, has never been attempted by Congress in more than two centuries.

Moreover, in order to prescribe a rule of decision in specific cases, § 27A(b) requires courts to reopen and then set aside judgments that have already been entered. In this case, the judgment that must be set aside is otherwise final and unappealable and implements the considered judicial judgment of the highest court in the Nation. Legislative intervention in judgments that are final is the worst kind of intrusion into the judicial process because it makes judicial decisions and the judgments flowing from those decisions forever vulnerable, inherently unstable and permanently open to political attack within and by the most political Branch of the Government.

Section 27A is therefore not only an immense enlargement of legislative power, it is a diminution, if not a total destruction, of judicial power. Judicial decisions become advisory opinions and the Legislature becomes the court of final resort.

The Due Process Clause, like the separation-of-powers doctrine, prohibits Congress from selecting which final decisions of courts will be overturned and which unsuccessful litigants will be made into successful ones. Legislative revision of judicial decisions strips away the protections of the judicial process and denies to litigants the rights and precautions that are the hallmarks of the exercise of the judicial power. Legislative revisions mean ultimately that neither the courts, nor their processes, are available to protect individual rights and guarantee the application of fair procedures.

ARGUMENT

I

SECTION 27A(b) MAY BE INTERPRETED TO AVOID THE SUBSTANTIAL CONSTITUTIONAL PROBLEMS ARISING FROM PETITIONERS' AND THE UNITED STATES' CONSTRUCTION OF THAT PROVISION

Petitioners and the United States interpret § 27A(b) to require, by legislative fiat, the reopening of unappealed judgments of Article III courts. As discussed below, this construction of § 27A(b) renders the provision unconstitutional under both the separation-of-powers doctrine and the Due Process Clause. This Court, however, may reasonably interpret § 27A to avoid these concerns. *See, e.g., Morrison* v. *Olson*, 487 U.S. 654, 682 (1988) ("it is the duty of federal courts to construe a statute in order to save it from constitutional infirmities").

The clearest and most straightforward construction of § 27A is to accept its words for what they literally say: federal courts are to apply limitation periods to § 10(b) cases as required by the law that existed on June 19, 1991 -- which is what this Court announced on June 20, 1991. This Court's recently re-articulated jurisprudence, as well as the text of § 27A, support that interpretation. Section 27A ordains that, for § 10(b) cases pending on June 19, 1991, the applicable limitation period "shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991." 15 U.S.C. § 78aa-1. Because this Court's "construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction," *Rivers* v. *Roadway Express, Inc.*, 114 S. Ct. 1510, 1519 (1994), the *Lampf* decision, although rendered on June 20, 1991, necessarily articulated "the limitation period provided by the laws applicable" in every jurisdiction on June 19, 1991. As the *Rivers* Court

explained, "when this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Id.* at 1519 n.12. Like the Court's decision in *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), *Lampf* "did not overrule any prior decision of this Court; rather, it held and therefore established that the prior decisions of [some of] the Courts of Appeals . . . [interpreting the statute at issue] were *incorrect*." *Rivers*, 114 S. Ct. at 1519.

Therefore, from a constitutional perspective, this Court's statement of the "law" on June 20, 1991, declared what the "law" was on June 19, 1991; otherwise, the Court in *Lampf* would have exceeded its Article III authority, which "is the power 'to say what the law is,' not the power to change it." *Beam*, 111 S. Ct. at 2451 (Scalia, J., concurring in the judgment) (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). As this Court explained as recently as April of this year, "it is not accurate to say that the Court's decision in *Patterson* 'changed' the law that previously prevailed in the Sixth Circuit when this case was filed. Rather, given the structure of our judicial system, the *Patterson* opinion finally decided what § 1981 had *always* meant and explained why the Courts of Appeals had misinterpreted the will of the enacting Congress." *Rivers*, 114 S. Ct. at 1519 n.12; *see also Harper* v. *Virginia Dept. of Taxation*, 113 S. Ct. 2510, 2523 (1993) (Scalia, J., concurring) (to assert that "[w]hen the Court changes its mind, the law changes with it" is "quite foreign to the American legal and constitutional tradition"). Thus, all courts today must conclude that the limitation period for § 10(b) cases on June 19 was exactly as this Court held on June 20.

It may well be that the language of § 27A does not reflect the intention of its sponsors as indicated in the legislative history. However, even where legislative history may reveal Congress' clear intention as to a statute's purpose, the statute's language may nevertheless "simply fail[ ] to give effect to that intention." *St. Martin*

Evangelical Lutheran Church v. *South Dakota*, 451 U.S. 772, 790 (1980) (Stevens, J., concurring). This Court must construe a statute according to its written meaning, and not according to a meaning discerned solely from its legislative history, which of course is not part of the statute enacted into law. *Cf. Landgraf* v. *USI Film Prods.*, 114 S. Ct. 1483, 1496 (1994) ("Although the passage of the 1990 bill may indicate that a majority of the 1991 Congress also favored retroactive application, even the will of the majority does not become law unless it follows the path chartered in Article I, § 7, cl. 2 of the Constitution.").

Alternatively, regardless whether § 27A mandates application of *Lampf* and *Beam* to cases pending on June 19, 1991, its text can quite reasonably be interpreted (as it was interpreted by Judge Keith below, Pet. App. 28a-30a) to be inapplicable to cases in which final judgments had been entered and the time for appeal had expired before § 27A was enacted. Since its earliest days and most recently in cases decided last Term, this Court has "declined to give retroactive effect to statutes burdening private rights unless Congress ha[s] made clear its intent." *Landgraf*, 114 S. Ct. at 1499. Indeed, "[e]ven when Congress intends to supersede a rule of law embodied in one of [this Court's] decisions with what it views as a better rule established in earlier decisions, its intent to reach conduct preceding the 'corrective' amendment must clearly appear." *Rivers*, 114 S. Ct. at 1519.

Thus, although § 27A(b) applies to cases that were commenced on or before June 19, 1991, and "dismissed" as untimely thereafter, it is not clear that Congress intended to apply this provision to final, nonappealable judgments, and this Court should certainly not stretch § 27A(b)'s text to import any such meaning or intent. Congress certainly knew how to draft language explicitly addressing "final judgments," having included it in the 1990 Civil Rights Act that was vetoed by the President. *See Landgraf*, 114 S. Ct. at 1492 n.8. Moreover, Congress was aware prior to enactment of § 27A(b) that if new statute-of-limitations

legislation responding to *Lampf* "applie[d] retroactively to cases finally adjudicated, there may be a separation of powers problem." *Securities Investor Protection Act of 1991: Hearings on S. 1533 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 102d Cong., 1st Sess. 379 (1991) (Cong. Research Serv. Mem.). Thus, it is not unreasonable to conclude that when Congress in 1991 failed to provide explicitly that § 27A(b) would reopen final judgments, Congress did not intend for the statute to apply to those judgments. *Cf. Landgraf*, 114 S. Ct. at 1493 ("The absence of comparable language in the 1991 Act [providing that the Act is to be applied retroactively] cannot realistically be attributed to oversight or to unawareness of the retroactivity issue."); *Georgia Ass'n of Retarded Citizens* v. *McDaniel*, 855 F.2d 805, 806 (11th Cir. 1988) ("Because Congress did not clearly express an intention to have the [Handicapped Children's Protection Act of 1986] apply to final judgments rendered prior to the date the Act became law, we hold, in light of the constitutional difficulties that would otherwise arise, that the Act may not be so construed."), *cert. denied*, 490 U.S. 1090 (1989).

Respondents acknowledge that both of these interpretations are inconsistent with the motives of the proponents of § 27A, but as this Court has said elsewhere, "legislative intention, without more, is not legislation." *Train* v. *City of New York*, 420 U.S. 35, 45 (1975).

These alternative interpretations of § 27A(b) are consistent with the language of the statute and the teachings of this Court. They each avoid the serious constitutional problems raised by petitioners' and the United States' construction of § 27A(b).

II

SECTION 27A(b) VIOLATES THE SEPARATION-OF-POWERS DOCTRINE

Section 27A(b) crosses far over a line carefully drawn by the Framers of the Constitution. It is a narrowly focused effort by Congress to render a decision of this Court a nullity in cases pending on a specific day and to require Article III courts to reopen, at the behest of plaintiffs, the judgments already rendered in those cases as a direct result of this Court's "nullified" decision. Section 27A(b) is not "legislation" in any traditional sense; indeed, it changes no substantive rule of conduct and operates only retrospectively. Rather, § 27A(b) is nothing more than a rule of decision purportedly adopted pursuant to legislative authority which, if tolerated by this Court, would permit the wholesale destruction of judicial authority under Article III to provide final adjudications of private disputes otherwise committed to the jurisdiction of the federal courts by statute. Whatever may be the limits on Congress' power to revise the content of federal substantive law in the wake of a decision of this Court that may be contrary to the will of a current (or future) Congress, § 27A(b) clearly transgresses those limits and is therefore unconstitutional under separation-of-powers principles relied on by the Framers and articulated by this Court for over 200 years.

A. The Framers Viewed The Separation Of Governmental Powers As The Central And Fundamental Structural Constitutional Principle

"This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta* v. *United States*, 488 U.S. 361, 380 (1989). Indeed, "[t]he leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government," *Freytag* v. *Commissioner*,

501 U.S. 868, 111 S. Ct. 2631, 2634 (1991), and "a bulwark against tyranny," *United States* v. *Brown*, 381 U.S. 437, 443 (1965). "'No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.'" *Freytag*, 111 S. Ct. at 2634 (quoting *The Federalist* No. 47, at 324 (Madison) (J. Cooke ed. 1961)).

Although the separation-of-powers doctrine does not mean that the three Branches must be entirely distinct, *Mistretta*, 488 U.S. at 380, it nonetheless draws firm and carefully conceived lines that delineate the respective spheres of authority of each Branch and thereby creates self-executing checks and balances to preclude domination by any one Branch of the other two. None of the Branches was permitted "to possess directly or indirectly, *an overruling influence* over the others in the administration of their respective powers." *Id.*, at 409 (quoting *The Federalist* No. 48, at 332 (Madison)) (emphasis added). "It is this concern of encroachment and aggrandizement that has animated [the Court's] separation-of-powers jurisprudence and aroused [its] vigilance." *Id.* at 382; *see, e.g.*, *Metropolitan Washington Airports Auth.* v. *Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 111 S. Ct. 2298, 2311 (1991).

The Constitution grants to Congress extraordinarily broad powers. The Legislature was expected to be animated by "an intrepid confidence in its own strength [and] all the passions which actuate a multitude." *The Federalist* No. 48, at 334 (Madison). The Framers recognized that the Legislative Branch thus posed the greatest threat to the balance of power. "Its constitutional powers being at once more extensive and less susceptible of precise limits, it can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." *Id.* It was against the "enterprising ambition of this department, that the people" were cautioned "to indulge all their jealousy and exhaust all their precautions." *Id.*

The Judiciary, by contrast, was perceived as the weakest Branch. *See The Federalist* No. 78, at 522-23 (Hamilton). This Court has therefore been especially alert to ensure that no statute "impermissibly threatens the institutional integrity of the Judicial Branch," *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 851 (1986), or makes "inroads into functions that have traditionally been performed by the judiciary," *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 84 (1982) (opinion of Brennan, J.).

B. The Separation-of-Powers Doctrine Prohibits Congress From Exercising Revisory Authority Over Article III Judicial Judgments

1. The Framers Intended To Bar Legislative Revision Of Judicial Decisions

The Framers were painfully aware of instances prior to the Philadelphia Convention in which colonial and state legislatures had upset final judgments or simply ordered the readjudication of a settled controversy. "[D]uring the first century or so of colonial government, legislative edicts requiring courts to reopen, vacate, rehear, or even reverse settled decisions upon the petition of the aggrieved losing party were not uncommon." Pet. App. 7a (citing G. Wood, *Creation of the American Republic 1776-1787* 154-55 (1969); *Judicial Action by the Provincial Legislature of Massachusetts*, 15 Harv. L. Rev. 208 (1901-02)). As Justice Powell has explained, "[o]ne abuse that was prevalent during the Confederation was the exercise of judicial power by the state legislatures." *INS* v. *Chadha*, 462 U.S. 919, 961 (1983) (Powell, J., concurring in the judgment).

The New Hampshire legislature, for example, "freely vacated judicial proceedings, suspended judicial actions, annulled or modified judgments, cancelled executions, reopened controversies, authorized appeals, granted exemptions from the standing law, expounded the law for pending cases, and even determined the merits of disputes."

E. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 Am. Hist. Rev. 511, 514 (1925) [hereinafter, E. Corwin, *Progress*]. Indeed, such practices "were widespread." *Id.* at 515. In Pennsylvania, the legislature remitted fines, disallowed judicially established claims and set aside jury verdicts. *Id.* at 520.[6]

Although legislative revision of final judgments apparently did not "offend the legal or political sensibilities" of the early colonial era, "these sensibilities changed considerably during the years following the outbreak of the Revolutionary War, particularly with the escalation of legislative interference in private disputes which occurred during the time of the Articles of Confederation, notably and most frequently to grant debtors 'relief' from creditors." Pet. App. 7a-8a; M.J.C. Vile, *Constitutionalism and the Separation of Powers* 153 (1967). These and other acts of legislative interference with final judgments were condemned in *The Federalist Papers* by Madison, who repeated and endorsed Jefferson's concern that the Virginia legislature had "'*in many* instances *decided rights* which should have been left to *judiciary controversy.*'" *The Federalist* No. 48, at 336 (quoting T. Jefferson, *Notes on the State of Virginia* 196 (London ed. 1787)). Madison also criticized the practice in Pennsylvania, where "the [State] Constitution had been flagrantly violated by the Legislature in a variety of important instances," including where "cases belonging to

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[6] The Provincial Legislature of Massachusetts also usurped judicial powers, including ordering the readjudication of settled controversies. For example, the legislature suspended the levying of an execution upon a judgment from a court; it voided a court's order to seize an individual's homestead as part of a judgment; and it ordered a court to hear an appeal and suspended the judgment of the lower court. *Judicial Action by the Provincial Legislature of Massachusetts*, 15 Harv. L. Rev. 208, 210-12, 217 (1901-02).

the judiciary department [had been] frequently drawn within legislative cognizance and determination." *Id.* at 336-37.

Hamilton expressed similar concerns and stated the principle that characterized the Framers' understanding of the separation of powers: *"A legislature without exceeding its province cannot reverse a determination once made, in a particular case*; though it may prescribe a new rule for future cases." *The Federalist* No. 81, at 545 (emphasis added); *see also id.* at 544 (discussing "absurdity" of permitting legislative revision of judicial judgments because the "pestilential breath of faction may poison the fountains of justice").

The views of Madison, Jefferson and Hamilton reflected the thoughts and actions of the Framers in drafting the Constitution. The Constitutional Convention rejected several proposals to allow for legislative revision of judicial judgments.[7] Reviewing the history of the Philadelphia Convention, "[a] clearer rejection of congressional authority over judicial powers is hard to imagine." R. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest For the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741, 791 (1984).

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[7] The Convention rejected a proposal that would have permitted legislative revision of certain federal court decisions by establishing the Congress as the "last Resort on Appeal in Disputes between two or more States," 1 M. Jensen, *The Documentary History of the Ratification of the Constitution* 246-47 (1976), and also a motion for the Constitution to provide that "the Judicial power shall be exercised in such manner as the Legislature shall direct," 1 J. Goebel, *History of the Supreme Court of the United States* 243 n.228 (1971) (citing 2 M. Farrand, *Records of the Federal Convention of 1787* 424-25, 431 (1911)).

2. This Court Has Made Clear That Congress Is Precluded From Revising Final Judgments Of Article III Courts And From Directing The Courts To Apply Particular Rules Of Decision To Decide Cases

The "judicial Power" vested in this Court and other Article III courts is, "by the express provision of" that Article, "limited to 'Cases' and 'Controversies.'" *Morrison*, 487 U.S. at 677; *e.g.*, *Mistretta*, 488 U.S. at 385; *Muskrat* v. *United States*, 219 U.S. 346, 356 (1911). The words "Cases" and "Controversies" work to limit the role of federal courts to that of determining rights and obligations of individual litigants in particular cases in accordance with the governing law. *See, e.g., Elmendorf* v. *Taylor*, 23 U.S. (10 Wheat.) 152, 159-60 (1825) (Marshall, C.J.); *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 816 (1987) (Scalia, J., concurring in the judgment) (the role of a federal judge is "to decide, in accordance with law, who should prevail in a case or controversy"). The power of judicial review derives from "the essence of judicial power," that is, the power "to say what the law is," *Marbury*, 5 U.S. (1 Cranch) at 177. But that power may only be exercised in the context of a case or controversy. Indeed, that limitation is the primary check in the Constitution against judicial overreaching.

The irreducible core of the authority of Article III courts to decide cases and controversies is the power to enter judgments that are final and conclusive of the rights of private litigants. As one scholar explained, "to produce judicial review, the notion of the Constitution as law must be accompanied by the principle of the finality of judicial constructions of the law." E. Corwin, *Progress*, at 524. For if final judicial determinations in particular cases could be overturned by legislative or executive action, federal courts would be rendered "'mere boards of arbitration whose judgments and decrees would be only advisory,'" *Young*, 481 U.S. at 796 (quoting *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911)). Thus, "[i]t has long been settled that a federal court has no authority . . .

'to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology* v. *United States*, 113 S. Ct. 447, 449 (1992) (citation omitted).

Consequently, the Members of this Court have recognized since *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), that the judgments of Article III courts adjudicating private rights cannot be reopened by the Legislative Branch.[8] *Hayburn's Case* arose from a statute enacted by Congress in 1792, authorizing pensions for disabled Revolutionary War veterans. *See* Act of Mar. 23, 1792, ch. 11, 1 Stat. 243. The statute provided for an applicant to file a claim with a federal circuit court, which then was to certify and transmit the claim "to the Secretary at War, together with [the court's] opinion in writing" of the pension amount to which the applicant was entitled. *Id.* § 2, 1 Stat. at 244. The Secretary could then accept the recommendation of the court or, if he had "cause to suspect imposition or mistake," the Secretary could "withhold the name of such applicant from the pension list, and make report of the same to Congress, at their next session." *Id.* § 4, 1 Stat. at 244.

Sitting as the New York Circuit, Chief Justice Jay, Justice Cushing and District Judge Duane concluded that federal judges could not, in their capacity as an Article III court, adjudicate claims under the statute. *Hayburn's Case*, 2 U.S. (2 Dall.) at 410; *Mistretta*, 488 U.S. at 402. The court reasoned that the duties assigned to the circuit by the statute were not "properly judicial" under Article III because the decisions of the court were subjected "first to the consideration and suspension of the secretary at war,

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[8] The views of the Justices in *Hayburn's Case* "have since been taken to reflect a proper understanding of the role of the Judiciary under the Constitution." *Morrison*, 487 U.S. at 677 n.15; *accord Mistretta*, 488 U.S. at 402-03 (*Hayburn's Case* is one of "our precedents").

and then to the revision of the legislature." *Hayburn's Case*, 2 U.S. (2 Dall.) at 409. The court also reasoned that Congress does not have the authority under Article I to overturn the judgment of an Article III court, concluding that "by the constitution, neither the secretary at war, nor any other executive officer, *nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.*" *Id.* at 409 (emphasis added).

Sitting as the North Carolina Circuit, Justice Iredell and District Judge Sitgreaves reached a similar conclusion: "inasmuch as the decision of the court is not made final, but may be at least suspended in its operation, by the secretary at war, if he shall have cause to suspect imposition or mistake; this subjects the decision of the court to a mode of revision, which we consider to be unwarranted by the constitution." *Id.* at 413. The court added "that no decision of any court of the United States can, under any circumstances, in our opinion, agreeable to the constitution, be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments." *Id.* And, sitting as the Pennsylvania Circuit, Justices Wilson and Blair and District Judge Peters also determined that federal courts could not adjudicate claims under the act, reasoning that "the business directed by this act is not of a judicial nature" and that the "revision and control" of the "judgments" of Article III courts by either Congress or the Executive Branch is "radically inconsistent with the independence of that judicial power which is vested in the courts." *Id.* at 411.

Thus, in *Hayburn's Case* the Justices recognized that an indispensible requirement for the exercise of Article III judicial power is the authority to adjudicate cases and controversies with finality, and that Congress therefore lacks the power under Article I to reverse judgments of Article III courts.

The views expressed by the Justices in *Hayburn's Case* regarding the necessary finality of Article III judgments resonate throughout this Court's later decisions and have never been reversed. For example, in *Massingill* v. *Downs*, 48 U.S. (7 How.) 760, 768 (1849), the Court declared that "where the right has attached in the courts of the United States, a State has no power, by legislation or otherwise, to modify or impair it. Retrospective laws of a remedial character may be passed; but no legislative act can change the rights and liabilities of parties, which have been established by a solemn judgment." In *United States* v. *O'Grady*, 89 U.S. (22 Wall.) 641, 648 (1874), the Court held that "inasmuch as the Constitution does not contemplate that there shall be more than one Supreme Court, it is quite clear that Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal or any other department of the government." And, in *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948), the Court declared that "[j]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government."

Indeed, the essence of an Article III judgment is that it is "final and conclusive upon the rights of the parties." *Gordon v. United States*, 117 U.S. 697, 702 (decided 1864, Opinion printed in Appendix 1885). Accordingly, if a federal tribunal's final judgments are subject to revision by either the Legislative or Executive Branch, the tribunal cannot be said to exercise judicial power "in the sense in which judicial power is granted by the Constitution to the

courts of the United States." *United States* v. *Ferreira*, 54 U.S. (13 How.) 40, 52 (1851).[9]

Although, since *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), the Court has, in certain carefully confined circumstances, permitted Congress to enact legislation that applies retroactively and thereby affect a *pending* case, *id.* at 110, the Court has also consistently emphasized that Congress lacks authority to alter private rights as determined by the final judgment of an Article III court once the "case's journey through the courts [has] come[] to an end," *Georgia Ass'n of Retarded Citizens*, 855 F.2d at 813; *see, e.g.*, *Pennsylvania* v. *The Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855) ("*Wheeling Bridge II*"); *The Clinton Bridge*, 77 U.S. (10 Wall.) 454, 463 (1870); *Hodges* v. *Snyder*, 261 U.S. 600, 603-04 (1923).

The *Wheeling Bridge* cases are not to the contrary. Indeed, they support the points made in the foregoing paragraphs. *Wheeling Bridge II* held that Congress has the authority to change the consequences of a final judgment of an Article III court to the extent that the judgment orders *prospective* relief affecting *public rights*. But the Court also held that Congress could not have reopened the case had the judgment at issue involved the final adjudication of private rights for legal damages. The controversy in *Wheeling Bridge* arose from the Court's decision in 1852 that a bridge was an impermissible obstruction of interstate navigation and ordering that it be raised to a certain height.

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[9] *Accord United States* v. *Mitchell*, 463 U.S. 206, 213 n.12 (1983); *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 582 (1962); *United States* v. *Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 400-01 (1934); *Williams* v. *United States*, 289 U.S. 53, 563-64 (1933); *District of Columbia* v. *Eslin*, 183 U.S. 62, 65 (1901); *In re Sanborn*, 148 U.S. 222, 224 (1893); *United States* v. *Waters*, 133 U.S. 208, 213 (1890); *Gordon*, 117 U.S. at 703.

Pennsylvania v. *The Wheeling & Belmont Bridge*, 54 U.S. (13 How.) 518 (1852) ("*Wheeling Bridge I*"). Congress subsequently enacted legislation declaring the bridge to be a lawful structure and a designated post road. In *Wheeling Bridge II*, the Court held that the *Wheeling Bridge I* decree could be modified to the extent that it granted prospective relief (*i.e.*, an injunctive decree) and involved the "public right of the free navigation of the river." 59 U.S. (18 How.) at 431.

The Court in *Wheeling Bridge II*, however, was careful to point out that if *Wheeling Bridge I* had involved the "adjudication of the private rights of parties" and the remedy sought had been damages, the final judgment "would have passed beyond the reach of the power of congress." *Id.* In these circumstances, the Court observed, "the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff." *Id.*; *see also The Clinton Bridge*, 77 U.S. (10 Wall.) at 463 (*Wheeling Bridge II* concluded "that if the remedy had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the power of Congress"). Therefore, "[t]he decree before us . . . [adjudging] costs" -- the private rights aspect of the judgment concerning the award of retrospective monetary relief -- "is unaffected by the subsequent law." *Wheeling Bridge II*, 59 U.S. (18 How.) at 431; *see also Hodges*, 261 U.S. at 603-04 (*Wheeling Bridge II* held that "in so far as a private right has been incidentally established by such judgment, as for special damages to the plaintiff or for his costs, it may not be thus taken away").

The *Wheeling Bridge II* Court's distinction between final judgments adjudicating private rights and executory decrees affecting public rights is consistent with this Court's recognition that a claim involving private rights is "a claim of the kind assumed to be at the 'core' of matters reserved to Article III courts." *Commodity Futures Trading Comm'n*, 478 U.S. at 853; *Northern Pipeline*, 458 U.S. at

70 (opinion of Brennan, J.) ("Private disputes . . . are at the core of the historically recognized judicial power."). And *Wheeling Bridge II*'s distinction between judgments for monetary damages and injunctive relief recognizes that injunctive decrees are, in a sense, "'legislative' in function, attempting to control the legal status of a variety of future actions which the parties, or others, might or might not wish to take." *Daylo* v. *Administrator of Veterans' Affairs*, 501 F.2d 811, 818 (D.C. Cir. 1974). "Since injunctive relief necessarily depends on a continuing affront to one's legal rights, while legal relief depends only on a judicial determination that one's legal rights have been violated with resulting cognizable damage to the claimant, Congress could permissibly change the law so as to deprive a party of its right to injunctive relief." Pet. App. 16a-17a; *cf. Landgraf*, 114 S. Ct. at 1501 ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.").

The Court has been equally sensitive to efforts by Congress to prescribe rules of decision. *See United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871). In *Klein*, the Court struck down an act of Congress purporting to change the legal significance of a presidential pardon in certain pending cases because it "prescribe[d] a rule for the decision of a cause in a particular way" without changing the law for the future -- or in the language of the Court, without creating "new circumstances" in the law. *Id.* at 146-47. And in *Hurtado* v. *California*, 110 U.S. 516 (1884), the Court emphasized that, to be a proper legislative act, a statute "must be not a special rule for a particular person or a particular case." *Id.* at 535. Although this Court in *Robertson* v. *Seattle Audubon Society*, 112 S. Ct. 1407 (1992), upheld certain legislation affecting specific cases, that legislation had prospective effect on the law. *See id.* at 1410-11 (legislation at issue effected "a comprehensive set of rules to govern [timber] harvesting within a geographically and temporally limited domain . . . . [It] both required harvesting and expanded harvesting restrictions . . . . [And it] specified general

environmental criteria to govern the selection of harvesting sites by the Forest Service"). This Court has never upheld legislation that has no prospective effect, but serves only to direct a particular rule of decision to adjudicate private rights in pending Article III cases.

As the following paragraphs clearly demonstrate, § 27A(b) compounds the concerns expressed by the Justices in *Hayburn's Case* and the Court in *Klein*. It reopens for revision the final judgments of Article III courts and prescribes a rule of decision squarely at odds with this Court's final adjudication of "what the law is" in those cases.

C. Section 27A(b) Is An Impermissible Attempt By Congress To Reopen And Revise The Judgments Of Article III Courts

The parties all agree that *Hayburn's Case* and its progeny prohibit Congress from exercising revisory authority over Article III judicial decisions. *See, e.g.*, U.S. Br. at 12 (Congress may not "review[ ] the judgments of Article III courts."); Pet. Br. at 20 n.15 ("Congress clearly cannot reverse results in particular controversies between private parties."). There is similarly no dispute that Congress cannot "'prescribe a rule for the decision of a case in a particular way' without changing the underlying law." *Id.* (quoting *Klein*) As shown below, § 27A(b) constitutes both a "reopening" and "revision" of judicial decisions within the meaning of *Hayburn's Case*, and the prescription of a rule of decision within the meaning of *Klein*. Thus, a careful review of what § 27A(b) does -- and does not do -- demonstrates that this provision combines the worst features of previous congressional efforts to undermine and usurp judicial functions.

1. Section 27A(b) Is An Exclusively Retroactive Rule Of Decision That Seeks To Reopen And Reverse The Judgments Of This Court In *Lampf* And Of Lower Courts That Had Dismissed § 10(b) Cases As Untimely Under *Lampf* Prior To § 27A(b)'s Enactment

As demonstrated in respondents' recitation of the legislative history of § 27A above, pp. 3-7, the purpose and interest of Congress in enacting § 27A were, unabashedly, to recall the mandate and reverse the judgment of this Court in *Lampf* as to the parties in that case and to nullify the application of *Lampf* to all other § 10(b) cases pending in the courts as of June 19, 1991, including § 10(b) cases in which final judgments had been entered based upon application of *Lampf* prior to the enactment of § 27A. These were not incidental effects of § 27A; as discussed above, they are the *only* effects of § 27A as enacted. The net of it is that § 27A attempts to reduce *Lampf* to a totally advisory opinion with regard to the parties in *Lampf* and the parties to all § 10(b) cases pending on June 19, 1991.

The Court in *Lampf* held that the statute of limitations for § 10(b) cases was one year after plaintiff's discovery of the alleged fraud, but no more than three years after the violation occurred. The Court evaluated the facts before it in *Lampf*, decided that the plaintiffs' § 10(b) claims were untimely under this rule, and entered a judgment dismissing the claims. As a result of and in reliance on § 27A(b), however, the district court granted the *Lampf* plaintiffs' motion to reinstate their § 10(b) claims despite this Court's decision that the claims were untimely. *See Gilbertson* v. *Leasing Consultants Assocs.*, No. 86-1369-RE (D. Or. Feb. 6, 1992) (ten copies of the district court's reinstatement order have been lodged with the Clerk). Because the *Lampf* case was "commenced . . . before June 19, 1991," 15 U.S.C. § 78aa-1(b), "dismissed as time-barred subsequent to" that date by this Court and "would have been timely," *id.*, under the pre-*Lampf* rule applied by the Ninth Circuit, the district court in *Lampf* ruled that it had no choice but to reject this Court's

otherwise binding determination of the law as applied to the parties in that case.

Section 27A(b) was also intended to overturn the *Lampf* decision's applicability to all other cases that were pending on June 19, 1991, by directing the lower federal courts to ignore this Court's interpretation of § 10(b) in deciding those cases. In so doing, Congress correctly recognized that this Court's decision in *Beam* would be held to require full retrospective application of *Lampf* to all § 10(b) cases that were, as of June 20, 1991, pending in any trial or appellate courts. Thus, Congress was seeking to obliterate a constitutionally compelled component of the exercise of Article III judicial power, what this Court subsequently articulated as "the fundamental rule of 'retrospective operation' that has governed '[j]udicial decisions . . . for nearly a thousand years.'" *Harper*, 114 S. Ct. at 2516 (quoting *Kuhn* v. *Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)). If Congress may strip this Court, and all inferior federal courts, of an essential attribute of the *judicial* function -- declaring the law and applying that law to pending cases -- as it has attempted to do by enacting § 27A, there would be no barrier to Congress' doing so in any circumstance. But that is neither the business of Congress under our separation of powers, nor is it tolerable given the independence of the federal judiciary guaranteed by Article III.

Following the requirements of this Court's rulings in *Lampf* and *Beam*, the district court in this case exercised its core Article III power and issued a final (although appealable), binding and conclusive decision dismissing the case with prejudice. No appeal was taken. Congress then decided it did not like the result required by *Lampf* and *Beam* and reached out to overrule the district court's decision on the precise point on which it had entered final judgment in favor of respondents. In every sense of the word, Congress has revised the decision of the district court in this case in the course of revising, retrospectively, the decisions of this Court in *Lampf* and *Beam*, and has

prescribed a rule of decision directly contrary to the rule prescribed by this Court and applied below.

Indeed, § 27A(b) presents a far more serious and immediate separation-of-powers problem than the statute in *Hayburn's Case*. The *Hayburn's Case* Justices concluded that Congress could not vest non-Article III tribunals, either the Secretary of War or the Congress, with the potential authority to revise judicial decisions. However, neither Congress, nor the Secretary of War for that matter, had actually sought to revise a decision in *Hayburn's Case*, let alone to impose a rule of decision contrary to that applied by the federal courts in order to change the results in cases.

Section 27A(b) also is more egregious than the statute struck down by this Court in *Klein*. Like the statute at issue in *Klein*, § 27A(b) "prescribes a rule for the decision of a cause in a particular way" without changing the existing law for future cases. But unlike § 27A(b), the statute in *Klein* did not revise or reverse final judgments, dictating a new rule only in cases that were still alive in the federal courts.

Section 27A(b)'s purely revisory effect is made even more obvious by the fact that it has no prospective effect whatever. The statute's attempt to prevent the application of this Court's judgment and mandate in *Lampf* to § 10(b) cases pending in the courts as of June 19, 1991, cannot be rationalized as ancillary to an exercise of Congress' primary legislative function, which is to make policy judgments and enact rules of law to govern future conduct, even if such a rationalization would save a broader statute. *See New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 370-71 (1989) ("'Legislation . . . looks to the future and changes existing conditions by making a new rule to be applied thereafter'") (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908) (Holmes, J.); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 513 (1989) (Stevens, J., concurring in part and concurring in the judgment) ("Legislatures are primarily

policymaking bodies that promulgate rules to govern future conduct."). Certain Members of Congress may have wanted to overrule *Lampf*, but they did not have the votes to do so. Therefore Congress did not enact a new statute of limitations with general application to govern future conduct and future § 10(b) claims. Rather, it settled for enactment of § 27A, which is concerned *only* with changing the results of specific decisions of Article III courts that Congress did not like, and nothing else.

2. The Attempts Of Petitioners And The United States To Distinguish § 27A(b) From Impermissible Legislative Intrusions On Judicial Authority Are Without Merit

a. It is of no legal significance that § 27A(b) requires plaintiffs to decide whether to invoke its benefits.

The United States apparently concedes that, under *Hayburn's Case*, "if Congress enacted a self-executing statute that purported to set aside the judgment of a court," that statute would violate the separation of powers. U.S. Br. at 14. The Government's focus on the fact that § 27A(b) is not, as the Government puts it, "self-executing," is difficult to fathom. Perhaps the Government is simply arguing that Congress may eviscerate the final exercise of Article III judicial power indirectly (by placing the necessary tools in the hands of a class of private litigants), even though Congress may not do so directly. Congress, however, may not accomplish by indirection what the constitutional separation of powers forbids Congress to do directly. *See Metropolitan Washington Airports Auth.*, 111 S. Ct. at 2307-12 & n.4 (Congress could not exercise the executive power indirectly through representatives' membership on board of review).

The Government, consistently with this flawed premise, proceeds to argue that § 27A(b) is not comparable to the statute at issue in *Hayburn's Case* because "the plaintiff must file a motion with the court invoking the legal standards provided by Section 27A; the court then applies

those standards." U.S. Br. at 15. But § 27A(b) commands the courts to vacate final judgments in cases that "would have been timely filed" under the pre-*Lampf* legal rules, leaving no more discretion to the courts than a decision of this Court reversing a lower court ruling and remanding for further proceedings consistent with the Court's opinion. Private litigants always possess the freedom to determine whether to prosecute civil litigation. For constitutional purposes, Congress' decision to provide for the reopening of only those cases in which the plaintiff wishes to do so by filing a motion to reinstate is functionally indistinguishable from a "self-executing statute" that requires automatic reinstatement subject to a plaintiff's freedom voluntarily to dismiss the litigation following reinstatement. Therefore, § 27A(b)'s procedural mechanism for overturning final judgments does not protect judicial independence or mitigate the seriousness of Congress' intrusion into core judicial functions.

b. It is not legally significant that Congress did not acknowledge that it was acting like a court.

The United States also asserts that § 27A(b) is valid because "Congress did not 'sit as a court of errors' to review the validity of judicial judgments under existing rules of decision." U.S. Br. at 13 (citing *Hayburn's Case*, 2 U.S. (2 Dall.) at 410). As discussed above, however, the sponsors of § 27A(b) certainly believed they and their colleagues were acting as a "court of errors," and the text of § 27A(b) belies the Government's assertion because the only cases upon which § 27A(b) operates are cases that were dismissed prior to the enactment of § 27A(b).

Furthermore, the decisions of this Court and the lower federal courts make clear that to exercise "judicial Power" impermissibly, Congress need not assemble in a courtroom and literally "sit as a court of errors" as the Government's narrow reading of *Hayburn's Case* would suggest. The rule in *Hayburn's Case* is a prohibition on Congress' failing to give "binding and conclusive" effect to the final judgments of an Article III court. *Chicago & Southern Air*

Lines, 333 U.S. at 113-14; *Gordon*, 117 U.S. at 702. Simply stated, Congress exceeds its legislative authority and impermissibly intrudes on the Judicial Branch when, as it does with § 27A(b), it directs the reopening of final, nonappealable judgments of Article III courts in private rights cases. Indeed, Justice Iredell (one of the Justices in *Hayburn's Case*) made clear six years after *Hayburn's Case* his understanding that legislative powers generally do not include the authority to reopen final court judgments. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). In *Calder*, the Connecticut legislature had enacted a statute setting aside a final judgment entered by a court of that State in a civil case. Prior to enactment of the statute, the plaintiffs "were barred of all right of appeal," having not appealed within the prescribed time for appeal. *Id.* at 386-87. The effect of the statute was therefore identical to that of § 27A(b) -- "to revise" the final judgment of the court by "direct[ing] a new hearing of the case by the same court." *Id.* at 387 (Chase, J.). Justice Iredell observed that "[i]t may, indeed, appear strange to some of us, that in any form, there should exist a power [in the legislature] to grant, with respect to suits depending or adjudged, new rights of trial, new privileges of proceeding, not previously recognized and regulated by positive institutions." *Id.* at 398. He also stated that the power to "superintend the courts of justice" is "judicial in its nature; and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative, authority." *Id.*

c. Congress not only reopened this case, it directed how it shall be decided.

Congress did even more here than simply reopen final judgments. It trumped this Court's *Lampf* decision and acted as the ultimate appellate court when it enacted § 27A(b), deciding that the "law" on June 19, 1991, was not what this Court declared it to be in *Lampf*, and ordering the Article III courts below to ignore the decision of this Court, and, instead, apply a rule of decision that this Court in *Lampf* had decided was "*incorrect*." *Rivers*, 114 S. Ct.

at 1519. Therefore § 27A(b) substituted Congress' judgment for this Court's judgment as to the proper interpretation of § 10(b). It is difficult to imagine a more direct or more unrestrained usurpation. Alexander Hamilton would certainly be astonished to learn that the Constitution he described in *The Federalist Papers* "committed the judicial power in the last resort" to the legislature. *The Federalist* No. 81, at 544.

d. The constitutional deficiencies of § 27A(b) do not disappear by calling it a "law."

The United States also argues that simply because Congress created § 27A(b) by "passing a law" (*i.e.*, enacting a bill by majority vote of both Houses of Congress that was signed by the President), § 27A(b) constitutes a proper exercise of legislative power. *See, e.g.*, U.S. Br. at 13; *see also* Pet. Br. at 22-23. Congress, however, virtually *always* must act in this manner, and the fact that it did so here provides no answer to the question whether its enactment exceeded the bounds of both Articles I and III. *Cf. Hurtado*, 110 U.S. at 535 ("It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power."). The Court must "[l]ook[ ] beyond form to the substance of what [§ 27A(b)] accomplishes." *Thomas* v. *Union Carbide Agricultural Prods. Co.*, 473 U.S. 568, 589 (1985); U.S. Br. at 25 n.18. Congress passed many laws giving itself the power to exercise legislative vetoes, but those laws did not make the device constitutional. *Chadha*, 462 U.S. at 944-59. Instructing the courts to set aside their final decisions and apply a particular rule of decision is an act of judicial power despite its bicameral approval. The Framers did not separate judicial and legislative powers and simultaneously authorize Congress to breach that separation whenever it passed a "law."

The effect of § 27A(b) would have been precisely the same had Congress listed the cases by name and docket number that it wished to reverse, and declared: "Such cases were wrongly decided and are hereby reversed and

reinstated even though we [Congress] did not choose to adopt a new statute of limitations for cases filed after June 19, 1991." Congress' linguistic ingenuity cannot cure the blatant separation-of-powers violation effected by § 27A(b). *Cf. Brown*, 381 U.S. at 443.

e. Congress did not create a new right of action.

The United States argues that "[a]s a matter of substance, Section 27A(b) is no different in effect than the creation of a new right of action that duplicates the elements of Rule 10b-5, but that contains a new, and longer, statute of limitations." U.S. Br. at 25. This "argument" is no more than linguistic legerdemain. In the first place, § 27A does not even purport to create a new right of action; the right of action before and after the enactment of § 27A(b) is the result of judicial implication of that right for nearly five decades. Congress might someday choose to change it, but § 27A does not even purport to do so.

Second, § 27A leaves in place the substantive rule of law decreed by the *Lampf* Court while prohibiting the application of that rule of law to cases that were pending on June 19, 1991. In no sense does § 27A create "a new, and longer, statute of limitations" for § 10(b) cases pending on June 19, 1991. In fact, § 27A returns the interpretation of the § 10(b) statute of limitations in that narrow class of cases to precisely the chaos in which a plethora of conflicting state and federal rules co-existed prior to this Court's decision in *Lampf*. It certainly would not have been irrational, in the constitutional sense, for Congress -- in dealing with the merits of *Lampf* -- to establish prospectively a different federal statute of limitations for § 10(b) actions or to decide that state rules should apply. For Congress to legislate the pre-*Lampf* chaos, however, for a small collection of cases is both irrational and unconstitutional.

The fact is that Congress considered but failed to enact a new statute of limitations to govern future and past

§ 10(b) violations. It therefore resorted to reversing court decisions. It created no new rights of action and no new statute of limitations.

Congress appears never to have enacted a statute like § 27A(b). Despite the Government's speculation that Congress could constitutionally enact a statute that "lifts the bar of res judicata" in purely private litigation and authorize a new suit based on the same facts involving the same parties, it does not refer to a single instance where Congress has taken such action. *See* Oral Argument Tr. in *Morgan Stanley* at 49 (conceding that the United States knows of no case in which Congress attempted to set aside a judgment or eliminate the res judicata effect of a judgment involving only private parties).

Surely the United States should not be arguing that § 27A(b) is constitutional because it is "in substance . . . no different than" other arguably less intrusive and therefore permissible legislative actions. That kind of logic would eviscerate entirely the separation-of-powers doctrine, and can be made to defend almost any congressional activity. It has no limiting principle, and it would require the United States to confess error in *Chadha*. Indeed, the logic that the United States advances would permit Congress to convene adversarial hearings to decide appeals by majority vote in any case -- or to decide those appeals without adversarial proceedings in the pre-dawn hours with non-germane riders in the manner that it now dispenses highway funds and grants to universities.

In short, § 27A(b), and the United States' arguments defending it, "provide[ ] a blueprint for extensive expansion of the legislative power beyond its constitutionally-confined role." *Metropolitan Washington Airports Auth.*, 111 S. Ct. at 2312.

f. Precedents involving territorial courts and administrative decisions do not support intrusions on the power of the Article III Judiciary.

Petitioners and the United States cite *Sampeyreac* v. *United States*, 32 U.S. (7 Pet.) 222, 239 (1833), *Freeborn* v. *Smith*, 69 U.S. (2 Wall.) 160, 175 (1864), and *Stephens* v. *Cherokee Nation*, 174 U.S. 445 (1899), as precedent for Congress' reopening of the final judgment here. In those cases, however, the judgments subjected to legislative revision were not rendered by Article III courts but by entities that the Constitution places under the plenary control of Congress. *See Freytag*, 111 S. Ct. at 2656-57 (Scalia, J., concurring in part and concurring in the judgment); J. Story, *Commentaries on the Constitution of the United States* (R. Rotunda & J. Nowak eds., 1987 reprint) (1833) ("the courts of the territories are not constitutional courts, in which the judicial power conferred by the constitution on the general government, can be deposited. They are legislative courts, created in virtue of the general sovereignty, which exists in the national government over its territories. The jurisdiction, with which they are invested, is not a part of the judicial power, which is defined in the third article of the constitution"). Moreover, *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370 (1940), upheld a private bill reopening an administrative order and therefore did not constitute an "excursion of the Congress into the judicial function" or "affect[ ] judicial judgments." *Id.* at 381 & n.25.

3. The Statute In *Sioux Nation* Did Not Reopen A Final Judgment, But Rather Constituted An Exercise Of Congress' Debt-Paying Power

Petitioners and the United States rely extensively on *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980). *Sioux Nation*, however, involved a statute by which Congress "waive[d] the res judicata effect of a prior judgment entered in the Government's favor on a claim against the United States." *Id.* at 397. The Court's

holding was exceedingly narrow: "Congress' mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States does not violate the doctrine of separation of powers." *Id.* at 407. This holding was expressly predicated on Congress' "broad power to recognize and pay the Nation's debts," *id.* at 405, a power obviously not remotely involved in this case. Relying on a "legion" of prior cases authorizing Congress to waive res judicata and other affirmative defenses of the Government, *id.* at 399 n.24, the Court concluded that it was "clearly establish[ed] that Congress may recognize its obligation to pay a moral debt not only by direct appropriation, but also by waiving an otherwise valid defense to a legal claim against the United States," *id.* at 397.

The Court's holding was also predicated on its observation that in enacting the statute there at issue, "Congress was not reviewing the merits of the Court of Claims' decisions, and did not interfere with the finality of its judgments." *Id.* at 407. In contrast, in considering and enacting § 27A, it is clear that Congress *was* reviewing this Court's decision in *Lampf* and asserting the power to disturb final judgments.

Sioux Nation is additionally distinguishable because it implicates the "public rights" strand of the separation-of-powers doctrine, which "extends only to matters arising 'between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments,' and only to matters that historically could have been determined exclusively by those departments." *Northern Pipeline*, 458 U.S. at 67-68 (opinion of Brennan, J.) (citation omitted). As with the legal principle in *Sioux Nation*, the public rights doctrine "may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued." *Id.* at 67. The doctrine also recognizes that where, as in *Sioux Nation*,

Congress is capable of conclusively determining an issue -- such as whether and how to pay a debt of the United States -- without resort to the courts, it is acting pursuant to an "exceptional grant of power" that permits it to operate with greater freedom from "the general prescriptions of Art. III" even if it determines to commit some aspect of the decisionmaking process to the Judicial Branch. *See id.* at 69-70 & n.23.

Sioux Nation therefore neither addressed nor resolved the question presented by the case at bar. In fact, the Court apparently recognized that if Congress had not been exercising its debt-paying power and acting on behalf of the United States in its capacity as a litigant to waive its rights, but instead had "disturbed the finality of a judicial decree" in private litigation, its actions would have violated the principles set forth in *Hayburn's Case*, as well as "interfer[ed] with the independent functions of the Judiciary." *Sioux Nation*, 488 U.S. at 391-92; *see also id.* at 406 (noting that Congress had not "brought into question the finality of . . . earlier judgments"); *id.* at 429 (Rehnquist, J., dissenting) ("[A]s the Court apparently concedes, Congress may not . . . review and set aside a final judgment of an Art. III court, and order the courts to rehear an issue previously decided in a particular case.").

D. The Fact That The Final Judgment Is Predicated On A Statute-Of-Limitations Defense Is Irrelevant To The Question Presented

The United States asserts that a final judgment based upon statute-of-limitations grounds is entitled to less constitutional protection from legislative interference than judgments resting on other grounds. *See* U.S. Br. at 40-41. But there is no basis in logic or the Constitution for this argument.

It is widely recognized that a final judgment based on statute-of-limitations grounds is a judgment on the merits, *see, e.g., United States* v. *Oppenheimer*, 242 U.S. 85, 87-88 (1916) ("A plea of the statute of limitations is a plea to

the merits, . . . and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution.") (citation omitted); *Johnston*, 14 F.3d at 492, and the Federal Rules of Civil Procedure draw no distinction between a final judgment resting on limitation grounds and other types of final judgments, *see, e.g.*, Fed. R. Civ. P. 41(b). "Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Board of Regents* v. *Tomaino*, 446 U.S. 478, 487 (1980). Indeed, this Court has often explained that limitation periods are "vital to the welfare of society and are favored in the law" because "[t]hey promote repose by giving security and stability to human affairs." *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879); *accord McCloney* v. *Silliman*, 28 U.S. (3 Pet.) 269, 277 (1830); *Burnett* v. *New York Central Ry. Co.*, 380 U.S. 424, 428 (1965); *Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.*, 486 U.S. 888, 893 (1988).

The 1-and-3-year statute of limitations is an integral element of the § 10(b) private right of action. Congress enacted § 10(b) as part of a statutory scheme containing express private rights of action that, with only one exception not relevant here, contained the same basic 1-and-3-year statute of limitations. *Lampf*, 111 S. Ct. at 2780. That restraint on the assertion of private claims for relief was adopted only after extensive debate aimed at attaining an important substantive balance between the rights of victims of misconduct and the disincentives to the capital formation process that would result from a longer limitation period. *See, e.g.*, 78 Cong. Rec. 10,186 (June 1, 1934) (statement of Sen. Byrnes); 78 Cong. Rec. 8,200 (May 7, 1934) (statement of Sen. Byrnes). In *Lampf*, this Court concluded that Congress would have intended those same policy choices to apply to the remedy implied under § 10(b) which were an essential part of the entire comprehensive regulatory scheme adopted by the same Congress that enacted § 10(b). *See* 111 S. Ct. at 2780.

Even if the foregoing considerations are ignored, however, the sweeping arguments of petitioners and the United States concerning the authority of Congress to overturn final judgments could not be limited to statutes of limitations. A constitutional rule requiring courts (and Congress) to make *ad hoc* and subjective value judgments about the relative "worth" of judgments according to the legal theory that supports them would be completely unworkable. Thus, if *Hayburn's Case* does not limit Congress' authority to set aside all final judgments in cases involving private parties and legal damages, then all such judgments may be set aside by Congress, no matter what their legal basis. In fact, the United States, in its argument in *Morgan Stanley* last Term, correctly conceded that its separation-of-powers arguments in defense of § 27A(b) are *not* confined to statute-of-limitations judgments. *See* Tr. of Oral Arg. in *Morgan Stanley* at 46 (arguing that Congress could overturn final judgments of dismissal entered as a result of the Court's decision rejecting an aider-and-abettor cause of action in § 10(b) cases).

E. Section 27A(b) Is Fundamentally Different From Federal Rule of Civil Procedure 60(b)

The United States, citing Rule 60(b) of the Federal Rules of Civil Procedure, contends that § 27A(b) is but a "small variation on current practice" of the federal courts concerning whether and when a final judgment may be reopened. U.S. Br. at 23-25; *see also* Pet. Br. at 29-30. Section 27A(b)'s directive that courts set aside a specific category of judgments has, however, no kinship with historical and current practice under Rule 60(b), which vests sole authority and discretion in the courts to make decisions about when judgments may be set aside.

Rule 60(b) articulates this historic, exclusive power of the courts to reopen judgments in certain narrow instances, none of which apply here. The equitable power of courts to grant such relief from final judgments in extraordinary cases, such as where the judgment had been obtained by fraud, existed "[f]rom the beginning" and was "firmly

established in English practice long before the foundation of our Republic." *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 234, 244 (1944); *see* Note, *History and Interpretation of Federal Rule 60(b) of the Federal Rules of Civil Procedure*, 25 Temple L.Q. 77, 78-80 (1951).

"[U]nder Rule 60(b), final judgments are subject to a case-by-case evaluation by a tenured judge who is free from political pressure," *Johnston*, 14 F.3d at 493-94, and the decision to reopen a final judgment is left to the court's "narrow" discretion free from any control, direct or indirect, by Congress, *id.* at 493. Indeed, courts have interpreted Rule 60(b) not to require relief from a judgment merely because Congress has changed the law on which the judgment is based. *See, e.g., id.* at 497; *Daylo*, 501 F.2d at 823 (pointing out in ruling on a Rule 60(b) motion that Congress cannot disturb rights vested in a final judgment that is no longer subject to appeal); *see also Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 400-01 (1981) (parties that make a "'free, calculated, deliberate choic[e]' not to appeal" are not entitled to Rule 60(b) relief even where subsequent decision of this Court supplies new grounds for appeal and refusal to reopen the judgment would have resulted in inequities) (citation omitted).

Section 27A(b), by contrast, directly interferes with judicial power by *requiring*, at the behest of disappointed litigants, federal courts to reopen final judgments, depriving them of discretion to make such determinations. Thus, "Rule 60(b) in no way threatens judicial autonomy or implicates the separation of powers." Pet. App. 15a n.13. The "question [in this case] is not whether *the courts* may disturb final judgments, but whether *Congress* may disturb them." *Id.*

III

SECTION 27A(b) VIOLATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT

Section 27A(b) is also constitutionally invalid because it deprives litigants of vested rights without due process of law. In this regard, the separation-of-powers doctrine and the Due Process Clause are intertwined and complementary: whereas final judgments are protected under the separation-of-powers doctrine in order to ensure the institutional integrity and authority of the Judicial Branch and thereby protect individuals from tyrannical government, the Due Process Clause affords citizens protection from arbitrary congressional action destroying rights established by a final judicial judgment.

Like other intangible rights, *see, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011-12 (1984) (trade secrets), a final, unappealed judgment gives rise to a property right, and because a final judgment represents a decisive and conclusive declaration of rights between parties, this Court has characterized such rights as "absolute," *Wheeling Bridge II*, 59 U.S. (18 How.) at 431, regardless of subsequent legislation to the contrary, *see Hodges*, 261 U.S. at 603. A final judgment in favor of a defendant vests the defendant with the conclusive right *not* to pay damages -- an especially valuable right in the context of federal securities litigation, where it is not uncommon for plaintiffs to seek tens if not hundreds of millions of dollars in damages.

"[T]his Court has stated from its first Due Process cases . . . [that] traditional practice provides a touchstone for constitutional analysis," *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2339 (1994), and has recognized that a party may not be deprived of property through the imposition of liability in a case "without the safeguards of common law procedure," *id.* at 2340. The Court has regarded certain "basic" and "well-established" "procedural protections of

the common law" to be "so fundamental" that the failure to provide those protections in an adjudication constitutes a violation of the Due Process Clause. *Id.*

One of the traditional procedural guarantees of the common law has been that a legislature may not reverse or reopen a court's final judgment adjudicating private rights. Indeed, this Court explained in *Hurtado* v. *California*, 110 U.S. at 536 (cited with approval in *Honda*), "due process of law" excludes from legislative power "acts reversing judgments, . . . legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation." *See also Bagg's Appeal*, 43 Pa. 512, 515 (1862) ("A man's rights are not decided by due course of law, if the judgment of the courts upon them may be set aside or opened for further litigation by an Act of Assembly.").[10] Thus, although, some colonial and state legislatures did enact measures that interfered with the finality of court judgments, by the time

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[10] Nineteenth-Century state-court decisions consistently held that legislatures could not deprive litigants of final judicial judgments. *See, e.g., Denny* v. *Mattoon*, 84 Mass. (2 Allen) 361, 379 (1861) ("[A]n act of the legislature cannot set aside or annul final judgments or decrees. This is the highest exercise of judicial authority."); *Lewis* v. *Webb*, 3 Me. 326, 332 (1825); ("And can the legislature, by a mere resolve, set aside a judgment or decree of a Judicial Court, and render it null and void? This is an exercise of power common in Courts of law; a power not questioned; but it is one purely judicial in nature."); *Young* v. *State Bank*, 4 Ind. 301, 303 (1853) ("The legislature does not possess the power to grant a new trial in a suit at law. . . . The granting of a new trial is a judicial act, and, in this state, controlled by settled rules of law. . . . And it is a power that should not be possessed by the legislature, in its legislative capacity. . . ."); *Bates* v. *Kimball*, 2 D. Chip. 77, 90 (Vt. 1824) (holding that statute which reopened a final judgment was unconstitutional as it "is an assumption of Judicial power"); *De Chastellux* v. *Fairchild*, 15 Pa. 18, 20 (1850) (striking down statute that directed the reopening of a final judgment and stating that "[i]f anything is self-evident in the structure of our government, it is, that the legislature has no power to order a new trial, or to direct the court to order it").

of the adoption of the Constitution and the Bill of Rights, American practice banned legislatures from such intrusion into the judicial process. *See supra* pages 18-20; R. Berger, *Congress v. The Supreme Court* 182 (1969) ("True, some of the early legislators reversed ordinary judicial decisions, but such practices were vigorously condemned by Jefferson in 1782, and by the Pennsylvania Council of Censors in 1783, as part of a 'constitutional reaction,' which in Corwin's words, 'leaped suddenly to its climax in the Philadelphia Convention.'") (quoting E. Corwin, *The Doctrine of Judicial Review: Its Legal and Historical Basis, And Other Essays* 37 (1963)). As Justice Iredell stated in *Calder* v. *Bull*, it "appear[ed] strange" to him that the legislature should reverse the final judgment of a court. 3 U.S. (3 Dall.) at 398.

Thus, throughout the Eighteenth and Nineteenth Centuries this Court repeatedly declared that legislatures could not take away final judgments from private litigants, *see supra* pages 22-27, and in 1898, after the Fourteenth Amendment had made the federal due process requirements applicable to the States, this Court in *McCullough* v. *Virginia*, 172 U.S. 102 (1898), held that the reversal of a state court judgment on the basis of subsequently enacted legislation violated the Constitution:

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

172 U.S. at 123-24.

The United States urges the Court to reject *McCullough* as inconsistent with other decisions of this Court because the judgment at issue in that case "was pending on appeal when the state legislature changed the relevant law." U.S. Br. at 41. It is correct that this Court has held in certain

contexts that a judgment is not "final" for constitutional purposes until all appellate review has been exhausted or, if no appellate review is sought, the time for appeal has expired. *See, e.g., Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6 (1987). The Court's present understanding of finality, however, does not conflict with the underlying legal principle stated in *McCullough* that a court judgment adjudicating private rights under a claim for monetary damages, once it is determined to be final under the Constitution, may not be overturned by the Legislative Branch. Indeed, with the exception of a handful of courts upholding § 27A(b), the universal conclusion of the lower courts has been that *McCullough* remains good law and precludes a legislature from overturning "[a] judgment that has become final through exhaustion of all appellate remedies." *Central States, Southeast & Southwest Areas Pension Fund* v. *Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1345 (7th Cir.), *cert. denied*, 490 U.S. 1090 (1989).

This Court has consistently recognized this constitutional principle. *See, e.g., Stephens* v. *Cherokee Nation*, 174 U.S. 445, 478 (1899) (upholding Congress' power to regulate the final judgments of legislative courts, but reiterating that "it is undoubtedly true that legislatures cannot set aside the judgments of [Article III] courts"); *accord Forbes Pioneer Boat Line* v. *Board of Commissioners*, 258 U.S. 338, 340 (1922); *Hodges*, 261 U.S. at 603; *Chicago & Southern Air Lines*, 333 U.S. at 113; *cf. Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 310 (1945) (suggesting a due process problem may arise if a new statute of limitations "deprive[s]" a defendant "of a final judgment in its favor").

The United States argues that affording due process protection to final judgments is a "constitutional anachronism." U.S. Br. at 47. It relies on decisions of this Court that, it says, hold that "[i]n the realm of social and economic legislation, due process demands only that the legislature pursue a legitimate public purpose and that the impact on private property interests be rationally related

to the public ends of the law." *Id.* at 33. Yet, in none of the "social and economic legislation" cases cited by the Government was the property interest at issue embodied in a final judgment culminating a judicial process.

Moreover, the cases the United States cites that do involve legislation affecting judicial judgments are distinguishable from the case at bar. In *Fleming* v. *Rhodes*, 331 U.S. 100 (1947), for example, the statute upheld by this Court did not reverse a judgment involving a claim for monetary damages, but rather set aside a decree for prospective relief. As noted earlier, this Court has long recognized that altering the rights of parties in the future is quasi-legislative in nature and thus is understandably more subject to legislative modification. *See also Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 91 & n.6 (1958) (interpreting *Fleming* to uphold a statute that "applies prospectively only"). Nor did *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370 (1940), involve an attempt by Congress to intervene and reopen a dispute after the controversy had already been conclusively resolved by the judicial process. *See id.* at 381 & n.25. In *Freeland* v. *Williams*, 131 U.S. 405 (1889), which predates *McCullough*, this Court upheld the traditional power of a *court*, in the exercise of its equitable discretion, to enjoin execution of a final judgment "if it is against right, justice and law," but it did not hold that the legislature may, consistent with due process of law, *require* courts to reopen final judgments. *Id.* at 420.

The power to reopen final judgments has for good reason always been confined to the courts. As this Court acknowledged in *Landgraf*, there are serious risks inherent in permitting Congress to decide, on a retroactive basis, the private rights and liabilities of specific individuals: "The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a

means of retribution against unpopular groups or individuals." 114 S. Ct. at 1497.

These dangers are present, at least to some extent, whenever Congress passes any retroactive legislation, but they are intolerable where, as here, Congress acts to overturn the final judgments of courts. The "very object for which civil courts have been established . . . is to secure the peace and repose of society by the settlement of matters capable of judicial determination." *Southern Pacific R.R. Co.*, 168 U.S. 1, 48-49 (1897); *see also Federated Department Stores*, 452 U.S. at 401. Therefore, legislation that overturns final judgments, by definition, will "sweep away settled expectations suddenly." *Landgraf*, 114 S. Ct. at 1497.

The Judiciary was conceived by the Framers as an important check on legislative power, and thus a guarantee of the rights of private citizens. *See* E. Corwin, *Progress*, at 517 (explaining that the "structural and functional shortcomings of the early state constitutions played directly into the hands of both popular and doctrinal tendencies which distinctly menaced what, Madison called, 'the security of private rights'"). That check is worthless, however, if it may be overturned at will by the Legislative Branch in particular dismissed cases, effecting popular will as against private rights. As Hamilton observed, "[t]here is an absurdity in referring the determination of causes in the first instance to judges of permanent standing, and in the last to those of temporary and mutable constitution . . . . The habit of being continually marshalled on opposite sides, will be too apt to stifle the voice of both law and equity." *The Federalist* No. 81, at 544.

Allowing the Legislative Branch to step in at the conclusion of the judicial process and strip litigants of a final judgment is inherently unfair and inconsistent with traditional principles of due process. This Court has recognized that "[a] fair trial in a fair tribunal is a basic requirement of due process," *In re Murchison*, 349 U.S.

133, 136 (1955), and has therefore consistently held that a neutral and detached decisionmaker is required by due process, *see, e.g., Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813 (1986); *Tumey* v. *Ohio*, 273 U.S. 510 (1927). Permitting a legislature to overturn the final judgment of a court undermines this principle by subjecting the impartial and politically neutral decisionmaking of a judge to a majoritarian veto by an elected, political body. Furthermore, legislative revision of final judgments defeats the due process principle requiring notice and an opportunity to be heard before deprivation of a property right. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The last-minute, late-night horse trading that produced § 27A(b) is inherently inadequate to provide sufficient procedural safeguards for private litigants who have achieved a final victory in an adjudication. *Cf. Chadha*, 462 U.S. at 962 (Powell, J., concurring in the judgment) (noting "the Framers' concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power").

Thus, even if Congress were constitutionally authorized to exercise what has, to date, been understood to be the exclusive power of the courts under certain narrow circumstances to reopen final judgments, it would, as a matter of due process, be required to establish procedures and rules that substitute for the protections afforded by the adversarial process of the courts. *See Honda*, 114 S. Ct. at 2340-41; *id.* at 2342-43 (Scalia, J., concurring). Congress invoked no such procedures here, and its effort to take away respondents' judgment violates due process.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court below.

September 9, 1994

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APPENDIX

Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1 (Supp. IV 1992):

> **(a) Effect on pending causes of action**
>
> The limitation period for any private civil action implied under section 78j(b) of this title [§ 10(b) of the 1934 Act] that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> **(b) Effect on dismissed causes of action**
>
> Any private civil action implied under section 78j(b) of this title [§ 10(b) of the 1934 Act] that was commenced on or before June 19, 1991 –
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after the [date of enactment of this section] December 19, 1991.

Article I, Constitution of the United States:

> **Section 1.** All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.
>
> . . . .

Article III, Constitution of the United States:

> **Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . .
>
> **Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States; . . . between a State and Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, ...
>
> . . . .

Fifth Amendment, Constitution of the United States:

> No person shall. . . . be deprived of life, liberty, or property, without due process of law; . . . .

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1988):

> **§ 78j. Manipulative and deceptive devices**
>
> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--
>
> . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contri-

> vance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities & Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 (1994):

> **§ 240.10b-5 Employment of manipulative and deceptive devices.**
>
> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

No. 93-1121

In The

Supreme Court of the United States

October Term, 1994

ED PLAUT, NANCY McHARDY PLAUT, and JOHN GRADY,

Petitioners,

v.

SPENDTHRIFT FARM, INC., BATEMAN EICHLER, HILL RICHARDS, INC., FRANCIS M. WHEAT, GIBSON, DUNN & CRUTCHER, DELOITTE HASKINS & SELLS, NORMAN D. OWENS, AMERICAN INTERNATIONAL BLOODSTOCK AGENCY, INC.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

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ARGUMENT

I. THE COURT SHOULD RESOLVE THE CONSTITUTIONAL ISSUES RAISED BY SECTION 27A(b).

The Respondents initially argue that the Court should avoid constitutional adjudication of the issues it instructed the parties to brief in its order granting the Petition for Writ of Certiorari. Their argument that Section 27A was a codification of *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), however, requires this Court to disregard Congress' universally acknowledged legislative purpose and rules of statutory construction which presume that Congress intends to accomplish some legislative result when it acts. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941). Furthermore, nothing in the legislative history or the text of Section 27A supports the Respondents' alternative argument that Congress intended Section 27A(b) to apply only to pending cases. The Court should reject the Respondents' argument and decide the constitutional issues.

When the constitutionality of a statute is attacked, the Court may adopt a construction of the statute by which the constitutional questions may be avoided, if such construction is "fairly possible." *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986). That principle of statutory construction, however, does not give the Court the prerogative to ignore the "legislative will" in order to avoid constitutional adjudication. " '[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting

the purpose of a statute . . . ' or judicially rewriting it." *Id.* (citation omitted).

Acceptance of the Respondents' argument that Congress was referring to the statute of limitations announced in *Lampf* as the "laws exist[ing] on June 19, 1991," would require this Court to adopt a construction of Section 27A that renders the entire statute a nullity. The result would subvert the manifest legislative will and violate the presumption that Congress intends to effect some legislative result when it acts. *Shamrock Oil & Gas Corp. v. Sheets, supra.* The Respondents' theory that the Courts of Appeal misinterpreted Congress' intent for over forty years until this Court found the true and eternal limitations period for Section 10(b) actions may have some abstract appeal, but *Schor* precludes its use here to avoid constitutional adjudication of the validity of Section 27A.

The Respondents' alternative argument that Congress intended Section 27A(b) to apply only to pending cases is equally unpersuasive. First, the Respondents themselves expressly acknowledge that Congress intended Section 27A(b) to apply to final cases. *See* Respondents' Brief ("Resp.Br.") at 7 (Congress "unmistakably intended" to provide relief even if it meant "reopening dismissed cases.") Second, the text of the statute strongly supports the conclusion that Section 27A(b) was intended to apply to final cases.

Section 27A(a) applies to pending cases and clearly is constitutional.[1] A case remains pending after entry of a court's final order of dismissal with prejudice until all rights of appeal have been exhausted and the time for filing a petition for certiorari has elapsed or a petition has been finally denied. At that time, a case becomes final. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). Since Section 27A(a) applies to dismissed pending cases, Section 27A(b) must have been intended to apply principally to dismissed final cases. Furthermore, the provision for the motion to reinstate in Section 27A(b) is vital only in dismissed final cases because a variety of other procedures are available to obtain relief from a final order of dismissal if the case is pending.[2] Therefore, the Respondents' interpretation of Section 27A(b) finds no support in the text or structure of the statute.

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[1] *See, e.g., Freeman v. Laventhol & Horwath*, Nos. 92-6123, 92-6191 (6th Cir. July 21, 1994); *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78 (2d Cir. 1993); *Cooke v. Manufactured Homes Inc.*, 998 F.2d 1256 (4th Cir. 1993); *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir. 1993); *Berning v. A.G. Edward & Sons, Inc.*, 990 F.2d 272 (7th Cir. 1993); *Gray v. First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993); *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1841 (1993); *Henderson v. Scientific-Atlanta*, 971 F.2d 1567 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 114 S.Ct. 95 (1993).

[2] The procedural device selected by Congress to restore dismissed final cases to pending status – the motion to reinstate – was approved by this Court in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). Until Congress acted, the Petitioners had no procedural or substantive legal basis on which to seek further judicial review of the merits of their claims. Section 27A(b) furnished them with both.

There is no genuine dispute that Congress specifically intended to provide statutory relief to the Petitioners and other plaintiffs in dismissed final cases. This Court must recognize the legislative will, reject the Respondents' opening argument and proceed to consider the constitutionality of Section 27A(b).

II. SECTION 27A(b) DOES NOT CONTRAVENE THE SEPARATION OF POWERS DOCTRINE.

A. The Respondents Misinterpret Section 27A(b) And Argue The Wrong Separation Of Powers Issue.

The Respondents' separation of powers argument rests on two basic propositions. The first is that the separation of powers doctrine forbids Congress from exercising "revisory" authority over judicial judgments. *See* Resp.Br. at 16-28. The second is that Section 27A(b) violates that principle and, therefore, the separation of powers doctrine, because it "reverses" and "revises" final judicial judgments. *See Id.* at 29-43.

The Respondents' argument addresses the separation of powers issues raised by the statute in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). This is not *Hayburn's Case*, however, and Section 27A(b) bears no resemblance to that statute. Section 27A(b) is extraordinary remedial legislation which creates a new statute of limitations and a new right to further judicial review and adjudication for a defined class of securities plaintiffs. Unlike the statute in *Hayburn's Case*, Section 27A(b) does not constitute or authorize adjudication of individual cases or the exercise of appellate-type review over any judicial judgment by a

nonjudicial department. Therefore, it neither confers business of a nonjudicial nature on the federal courts nor interferes with or exercises the Judicial Power.

Because this is not *Hayburn's Case*, the Respondents' Brief fails to address the real separation of powers issues raised by Section 27A(b) and discussed in the Petitioners' Brief ("Pet.Br."). Congress clearly has power to enact new substantive laws which require the federal courts to set aside their previously entered "final judgments" of dismissal with prejudice if the cases are pending when the legislation becomes effective.[3] Consequently, the separation of powers issue presented by Section 27A(b) is *not* whether Congress has the power to require the federal courts to set aside final judgments of dismissal and to apply a new and different substantive (limitations) rule. It can do so and frequently does in pending cases. A case is pending until all rights *of the parties* to further appellate review are exhausted. At that time, the case becomes final. *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). Therefore, the real separation of powers issue raised by Section 27A(b) is whether the statutory requirement that final cases be *restored to pending status* for further adjudication under the new limitations period by itself constitutes an impermissible legislative exercise of the Judicial Power.

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[3] *See, e.g., The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); *Memorial Hosp. v. Heckler*, 706 F.2d 1130, 1137 (11th Cir. 1983) ("[U]ntil appellate rights are exhausted, even an otherwise valid judgment may be negated by supervening legislation"). *See also* cases upholding the constitutionality of Section 27A(a) in footnote 1.

In separation of powers cases, this Court focuses on "the practical effect that the congressional action will have on the constitutionally assigned role of the federal judiciary." *Pacific Mut. Life Ins. Co. v. First RepublicBank Corp.*, 997 F.2d 39, 54 (5th Cir. 1993) (quoting *Schor*). Here, the Respondents have failed to articulate any legitimate reason why legislation which restores final cases to pending status will have any adverse "practical effect" on the constitutionally assigned role of the judiciary. The judiciary's assigned role is to adjudicate – to find facts, apply the current laws and to pronounce judgment. *See Freytag v. Commissioner*, 501 U.S. 868 (1991). Congress' assigned role is to make the laws to be applied by the judiciary – including laws determining when and how the jurisdiction of the lower federal courts shall be invoked and what rights to appellate review shall be available.

The transition of a case from pending to final status has significant consequences for the parties to litigation.[4] The Respondents, however, have failed to demonstrate why the pending/final distinction should provide a bright line between the Legislative Power and the Judicial Power for separation of powers purposes. Creating rights to seek judicial relief is a uniquely legislative act, as is making and changing statutes of limitations. None of those acts even remotely involves adjudication, and adjudication is the essence of the Judicial Power. The fact that legislation creating new substantive rights affects parties to prior adjudications under old law has no practical

[4] The significance is that the parties' right to further appellate review ends, and the judicial judgment attains a degree of finality that is less than absolute. *See, e.g.*, Fed. R. Civ. P. 60(b).

effect on the assigned role of the judiciary to adjudicate, regardless whether the affected cases are pending or final.[5]

The Respondents have failed to show how the restoration of a defined group of final cases to pending status for further adjudication under new substantive rules constitutes a legislative exercise of the Judicial Power or that Section 27A(b) is invalid under any other aspect of the separation of powers doctrine.

B. Section 27A(b) Does Not Deprive The Courts Of Jurisdiction By Subjecting Future Judgments To Nonjudicial Appellate-Type Review.

The Respondents rely heavily on *Hayburn's Case* and its progeny to support their argument that Congress may not exercise "revisory authority" over final judicial judgments. Those cases clearly support the general principle that statutes which purport to authorize a nonjudicial department to exercise *appellate-type review* over final judicial judgments do not invoke the Article III jurisdiction of the federal courts with respect to the subject matter of such judgments. The rationale of those cases is that the contingent nature of the judgments (i.e., that they

[5] In upholding the statute in *Pope v. United States*, 323 U.S. 1 (1944), this Court stated, "[T]he Act's purpose and effect seem rather to have been to create a new obligation of the Government to pay petitioner's claims where no obligation existed before. *And such being its effect, the Act's impact upon the performance by the Court of Claims of its judicial duties seems not to be any different than it would have been if petitioner's claims had not been previously adjudicated there.*" 323 U.S. at 9 (emphasis added).

are subject to nonjudicial review) rendered the business referred by the statutes nonjudicial in nature because the resulting judgments would be in the nature of advisory opinions. Rather than invalidating the statutes, however, this Court generally has dismissed such cases for want of jurisdiction.[6]

Only a few of the other cases cited by the Respondents actually involved statutes that purported to authorize nonjudicial appellate-type review of judgments. In *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1865),[7] for example, this Court held that it lacked appellate jurisdiction over Court of Claims judgments because Section 14 of the Court of Claims Act[8] prohibited payment of a Court of Claims judgment until an appropriation therefor

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[6] After the defective statute in *Hayburn's Case* was repealed, Congress certainly could have enacted post-judgment remedial legislation to create a new pension for veterans who the courts had adjudged were ineligible. Such legislation would not have "reviewed" or "reversed" prior final judicial eligibility determinations denying pensions under the old rules, and no separation of powers issues or concerns would have arisen. Section 27A(b) is akin to this hypothetical remedial statute, not the statute in *Hayburn's Case*.

[7] The opinion cited by the Respondents, which was reported at 117 U.S. 697 (1864), Resp.Br. at 24-25, was not the opinion of the Court. *See, e.g., United States v. Jones*, 119 U.S. 477 (1886). The opinion of the Court was published at 69 U.S. (2 Wall.) 561 (1865).

[8] Section 14 of the Court of Claims Act, stated: "That no money shall be paid out of the treasury for any claim passed on by the court of claims till after an appropriation therefor shall have been estimated for by the Secretary of the Treasury." Section 14 subsequently was repealed by Act of Mar. 17, 1866, ch. 19, 14 Stat. 9.

had been "estimated for" by the Secretary of the Treasury. As in *Hayburn's Case*, the contingent nature of the judgments made the causes before the court nonjusticiable, and deprived this Court of appellate jurisdiction. Congress subsequently repealed Section 14, and thereafter the Court of Claims was recognized as an Article III court. *See United States v. Jones*, 119 U.S. 477 (1886).

Similarly, the statute at issue in *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851), authorized the Secretary of the Treasury to determine whether judgments on the claims of Spanish officers for injuries from U.S. Army activities in Florida were "just and equitable" before authorizing payment of same.[9] This Court held that a judgment made under the statute was simply the award of a commissioner and dismissed the appeal for want of jurisdiction. A number of the other cases on which the Respondents rely are to the same effect.[10]

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[9] Section 2 of the 1823 Act provided:

> [I]n all cases where the judges shall decide in favor of the claimants the decisions, with evidence on which they are founded, shall be by the said judges reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the Treaty [of 1819 with Spain], shall pay the amount thereof to the person or persons in whose favor the same is adjudged.

Ferreira, 54 U.S. at 45.

[10] *See Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103 (1948) (Held, administrative determinations regarding air routes unreviewable both before and after President reviewed order of the Civil Aeronautics Board); *District of Columbia v. Eslin*, 183 U.S. 62 (1901) (Held, Court had no jurisdiction to review Court of Claims case where Congress repealed jurisdictional statute prior to the entry of judgment); *In re Sanborn*, 148

Perhaps realizing that neither their separation of powers nor their due process arguments are independently sufficient to sustain their constitutional attack on Section 27A(b), the Respondents' have spun a web of citations to dicta from a blend of *Hayburn's Case*-type cases, due process cases and sovereign immunity cases in the apparent hope that the whole will be greater than the sum of the parts.[11] Their selective quotations of fragments from cases obscure the actual holdings and rationales of the cited authorities, many of which either did not turn on separation of powers issues[12] or merely cited to dicta.[13]

U.S. 222 (1893) (Held, appellant had no right of judicial review of determination of Court of Claims on claim submitted to Interior Department and referred to Court of Claims per statute); *United States v. Waters*, 133 U.S. 208 (1890) (Held, Attorney General without authority to reduce award of attorneys' fees).

[11] The constitutional issues in this case are separate and distinct. The separation of powers doctrine is concerned with the "right" of the judiciary to be a separate and independent branch of government. The Due Process Clause protects the "rights" of persons. The separation of powers doctrine is not concerned with private rights and the Due Process Clause was never intended to protect the judiciary from Congress.

[12] *See United States v. Mitchell*, 463 U.S. 206 (1983) (sovereign immunity case); *Hodges v. Snyder*, 261 U.S. 600 (1923) (due process case); *Massingill v. Downs*, 48 U.S. (2 Dall.) 409 (1792) (federalism case).

[13] *See Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (Held, Court of Claims judges could sit on Court of Appeals panels); *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386 (1934) (Held, internal revenue statute at issue, properly construed, did not require or permit post-judgment adjudication by the Commissioner of Internal Revenue); *Williams v. United States*, 289 U.S. 553 (1933) (Held, Court of Claims judges' salaries not constitutionally pro-

The Respondents also gloss over the crucial feature that distinguishes Section 27A(b) from the statutes at issue in *Hayburn's Case* and the other justiciability cases discussed above. Unlike those statutes, Section 27A(b) did not authorize a nonjudicial branch to exercise appellate-type review – to sit as a "court of errors" – to review, revise or reverse final judicial judgments without changing the substantive federal law. A concrete "case or controversy" always has been before this Court and the lower federal courts involved in this case. Nothing in the statute rendered any future judicial determination or judgment contingent in any way. The Respondents may complain that they no longer have the undeserved benefit of the order of dismissal, but that complaint addresses only their due process argument. They have provided no authority that Section 27A(b) either fails to invoke the jurisdiction of this Court or is otherwise invalid under the separation of powers doctrine.

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tected); *United States v. O'Grady's Ex'r*, 89 U.S. (22 Wall.) 641 (1875) (Held, Secretary of the Treasury had no statutory or other authority to deduct income taxes from judgment rendered by Court of Claims); *The Clinton Bridge*, 77 U.S. (10 Wall.) 454 (1870) (Held, statute enacted while case pending provides rule of decision); *Pennsylvania v. The Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855) (Held, Congress may annul a court's prior judgment where public rights are involved); *Georgia Ass'n of Retarded Citizens*, 855 F.2d 805 (11th Cir. 1988) (Held, statute permitting recovery of attorneys' fees did not apply to cases decided prior to statute's enactment).

C. The Provision Restoring Dismissed Final Cases To Pending Status Was Not A Legislative Exercise of the Judicial Power.

The separation of powers doctrine[14] is violated when Congress impermissibly interferes with the exercise of the Judicial Power by the judiciary, *see Nixon v. Administrator of General Services*, 433 U.S. 425, 433 (1977); *United States v. Nixon*, 418 U.S. 683 (1974), or exercises the Judicial Power. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *Springer v. Philippine Islands*, 277 U.S. 189, 203 (1928).

Regardless of its precise boundaries, the essence of the Judicial Power is the power to adjudicate – the authority to hear disputes, to determine facts, to "say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and to pronounce a judgment which determines the rights and liabilities of the disputants. Adjudication involves undertaking to "determine facts, apply a rule of law to those facts, and thus arrive at a decision" – these being "necessary . . . conditions for the

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[14] The Framers vested the executive, legislative and judicial powers in separate branches of the government. The boundaries between the branches are not precisely defined. *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). Rather, the Framers contemplated that "practice will integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Moreover, the separation of powers doctrine is applied such that the boundaries between each branch is fixed "according to common sense and the inherent necessities of the governmental co-ordination." *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928).

exercise of federal judicial power." *Freytag v. Commissioner*, 501 U.S. 868 (1991). *See also Muskrat v. United States*, 219 U.S. 346, 356 (1911); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908); *Kuhnert v. United States*, 36 F. Supp. 798 (W.D. Mo. 1941), *aff'd*, 127 F.2d 824 (8th Cir. 1942).

Congress has the power under Article I to amend statutes of limitations to extend the limitations period or revive causes of action that had been extinguished under an old statute. *See, e.g., International Union of Elec. Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229, 243-44 (1976); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304 (1945); *Campbell v. Holt*, 115 U.S. 620 (1885). There is no question about Congress' intent to achieve this result through Section 27A. Congress also has broad powers to enact retroactive legislation which may require the courts to set aside their validly entered final judgments in pending cases. *See, e.g., The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); *Memorial Hosp. v. Heckler*, 706 F.2d 1130, 1137 (11th Cir. 1983). *See also, Freeman v. Laventhol & Horwath*, Nos. 92-6123, 92-6191 (6th Cir. July 21, 1994), in which the Sixth Circuit Court of Appeals upheld the constitutionality of Section 27A(a).

This case was pending until after September 12, 1991, the last day on which the Petitioners could have filed a Notice of Appeal from the final order of dismissal. Fed. R. App. Proc. 4. Had Section 27A been enacted on September 12, 1991, Section 27A(a) would have required the District Court below to set aside its final order of dismissal with prejudice and to proceed with the case under the new statute of limitations, notwithstanding its earlier determination that the action was time-barred under

prior law. *Freeman, supra*. That application of Section 27A(a) clearly would not have involved retroactive "legislative adjudication." *Id*.

Neither the Sixth Circuit Court of Appeals nor the Respondents explain why the status of a case as pending or final defines an impenetrable boundary between the Legislative Power and the Judicial Power.[15] This Court

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[15] Amicus Washington Legal Foundation ("WLF") offers a modest proposal to deal with this issue. It suggests that this Court sweep aside *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) and countless other cases, and adjudge that all retroactive legislation, including that which affects any civil case, pending or final, is unconstitutional. According to WLF, this decree is required by the Due Process Clause and the "Rule of Law," which provides that "the government *in all its actions* is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge." WLF Br. at 9 (Emphasis added.) If the foregoing definition correctly states the Rule, its rationale and the tenet that it binds all branches of the government, the adoption of WLF's Rule of Law certainly would mandate the concurrent reversal of the decision to apply Section 9(e) of the 1934 Act to the facts in *Lampf* and the order dismissing this case.

Apparently WLF, like the Respondents, is unable to articulate a separation of powers principle or authority that endows the pending-to-final transition with constitutional significance. WLF's approach would eliminate that problem. In the absence of authority which recognizes either WLF's Rule of Law as a constitutional principle or its novel construction of almost 200 years of well-understood constitutional adjudication, however, a change of that magnitude in our jurisprudence is more properly effected by Constitutional amendment than by application to this Court.

has emphasized that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986), *quoting Thomas v. Union Carbide Agricultural Prod. Co.*, 473 U.S. 568, 587 (1985). The practical effect of the motion filed by the Petitioners pursuant to Section 27A(b) was to restore this case to "pending" status.[16]

Section 27A(b) survives separation of powers scrutiny because it does not authorize adjudication (including appellate-type review) of individual cases by a nonjudicial branch. If it did so, the statute should be invalid, regardless whether the affected cases were pending or final. Unlike the statute in *Hayburn's Case*, Section 27A(b) takes no power from the judiciary. To the contrary, it expands the jurisdiction of the courts by creating a new right to further judicial review of a defined group of cases under the law as amended.[17] Its enactment was a purely legislative act.

The Respondents fail to diminish *United States v. Sioux Nation*, 448 U.S. 371 (1980), as precedent for legislative reopening of final cases. Their argument that the statute in *Sioux Nation* "did not reopen a final judgment," Resp.Br. at 38, is blind denial. The *only* purpose and effect of that statute was to reopen a single identified *final case*

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[16] Indeed, in what practical sense is this case *not* now pending?

[17] All rights to appellate review of a lower federal court judgment are created by statute. *United States v. Young*, 544 F.2d 415, 416 (9th Cir. 1976), *cert. denied*, 429 U.S. 1024 (1977).

for further judicial review of the *same claim*.[18] The Respondents also fail to answer the Petitioners' argument that the identity of the parties in *Sioux Nation* is irrelevant to a separation of powers analysis. *See* Pet.Br. at 18-19. That the United States was a party or that it arguably was waiving its own rights had no bearing on this Court's prior necessary and separate determination that a statute reopening a final case is not an impermissible legislative exercise of the Judicial Power.

The Respondents' dismissal of the Petitioners' argument that Section 27A(b) created new procedural and substantive rights (Pet.Br. at 22-23) as a "linguistic legerdemain" (Resp.Br. at 36) is nonsense and signifies their inability to rebut it. The lower courts now generally acknowledge that Section 27A "changed the underlying substantive law for § 10(b) claims pending before *Lampf*." *See Freeman v. Laventhol & Horwath, supra,* and the cases upholding Section 27A(a) cited therein. Those cases generally reject the Respondents' arguments that Section 27A violated the rule in *United States v. Klein*, 80 U.S. (13 Wall) 128 (1871)[19] or the retroactivity principles in *James B.*

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[18] "[T]oday the Court permits Congress to reopen that judgment which this Court rendered final upon denying certiorari in 1943." *Sioux Nation*, 448 U.S. at 424 (Rehnquist, J., dissenting). Unlike the statute in *Sioux Nation*, Section 27A(b) applied to a class of cases and changed the substantive law to be applied.

[19] In so ruling, the Sixth Circuit Court of Appeals stated,

> This case is not *Klein*. Section 27A does not direct courts to make specific factual findings or mandate a result in a particular case. It does not remove or alter the courts' constitutional adjudicatory function. Instead, in Section 27A, Congress prescribed a new statute of limitations for the judiciary to apply to all Section 10(b) litigation pending on June 19, 1991. Surely Congress has the power to change a rule of law and make that change applicable to pending cases. Anixter, 977 F.2d at 1545 (cites omitted). We find that § 27A does not direct certain factual findings or impose a rule of decision for § 10(b) claims. Rather, § 27A changed the underlying substantive law for § 10(b) claims pending before *Lampf*. Accordingly, we adopt the Tenth Circuit's analysis of this issue and hold that § 27A (sic) does not violate the separation of powers doctrine.

Freeman, slip op. at ___.

Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991). *Id.* In so holding, they also negate the Respondents' basic characterization and interpretation of Section 27A(b) and eviscerate two key elements of their separation of powers argument.

The distinction between pending cases and final cases is significant. It defines the point at which the parties' rights to further appellate review terminates. That distinction, however, does not define the boundary between the Judicial Power and the Legislative Power. The expiration of a time period that is within the Legislative Power to establish does not convert a valid legislative act into an invalid judicial act. A statute which changes the substantive law and restores dismissed final cases to pending status for further adjudication takes no power from the judiciary. The restoration of *Sioux Nation* certainly has had no adverse practical effect on the ability of the judiciary to perform its assigned role. Section 27A(b) does not violate the separation of powers doctrine.

III. SECTION 27A(b) DOES NOT CONTRAVENE THE FIFTH AMENDMENT DUE PROCESS CLAUSE.

A. The Respondents Appear To Concede That Section 27A(b) Passes Muster Under The Rationality Test Of Due Process.

The Respondents apparently concede, as they must, that the test of due process for the retroactive aspects of legislation is whether they advance "a legitimate legislative purpose furthered by rational means." *See General Motors Corp. v. Romein*, 112 S.Ct. 1105, 1112 (1992), *quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). *See also United States v. Sperry Corp.*, 493 U.S. 52, 64-65 (1989); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). They also seem to concede that Section 27A(b) easily meets that test. Their only attempt to avoid the consequences of those apparent concessions is to argue that the rationality test never has been applied to rights arising from a final judgment. *See* Resp.Br. at 47-48. Even if true, that argument provides no basis for refusing to apply the general constitutional test of due process to Section 27A(b).

B. The Respondents Offer No Justification For Refusing To Apply The Rationality Test.

Rather than explaining why the recently announced due process standard should not apply, the Respondents stubbornly press their claim that the "vested rights" doctrine confers an absolute and inalienable property right to the bar of limitations announced in *Lampf* simply because

it was judicially applied to the facts of this case and this case happened to become final before Section 27A was enacted.

After *Lampf* and *Beam* it required little adjudication to arrive at the conclusion that this action suddenly and unexpectedly became time-barred. The Petitioners did not even oppose entry of the order of dismissal. There is no valid reason why thirty-one days after the entry of an unopposed order of dismissal on limitations grounds the Respondents should fairly be deemed to have acquired a new absolute and immutable property right in the *Lampf* limitations bar, and thus be forever excused from having to answer for their fraud.

Even if the rationality test were not dispositive, the Respondents' claim that the "vested rights" doctrine renders all judgments in final cases sacrosanct cannot withstand scrutiny for the reasons set forth in the Petitioners' Brief. When a case becomes final, the parties' rights are settled. They are not, however, etched in stone. *See, e.g., Federal Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 91 n.6 (1958); Fed. R. Civ. P. 60(b). No principle justifies expanding the consequences of the termination of the parties' right to further litigation to include the creation of the sublime specie of property right now claimed by the Respondents. *See Fleming v. Rhodes*, 331 U.S. 100, 107 (1947).

Congress' legislative purpose to relieve the unprecedented injustice effected by the application of *Lampf* to this case was entirely legitimate. The means chosen were eminently rational. Therefore, Section 27A(b) does not contravene the Fifth Amendment Due Process Clause.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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Dated: October 26, 1994.

(9)

No. 93-1121

In the Supreme Court of the United States

OCTOBER TERM, 1994

ED PLAUT, ET AL., PETITIONERS

v.

SPENDTHRIFT FARM, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

The Court's grant of certiorari is limited to the following question:

Whether Section 27A(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78aa-1, to the extent that it requires reinstatement of Section 10(b) actions dismissed with prejudice pursuant to judgments that became final prior to the enactment of Section 27A(b), contravenes the separation-of-powers doctrine or the Fifth Amendment Due Process Clause of the United States Constitution.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-30a) is reported at 1 F.3d 1487. The opinion of the district court (Pet. App. 31a-39a) is reported at 789 F. Supp. 231.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1993. The petitions for rehearing were denied on October 14, 1993. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on January 11, 1994, and was granted on June 6, 1994.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. 78aa-1 (Supp. IV 1992), is reproduced at App., *infra*, 1a.

STATEMENT

1. In November 1987, petitioners filed a private securities fraud action in the United States District Court for the Eastern District of Kentucky. The complaint alleged claims arising under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b) (1988) (Exchange Act), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.-10b-5, as well as pendent state law claims. Pet. App. 31a-32a.

When the suit was filed, the Exchange Act did not contain a statute of limitations expressly applicable to claims under Section 10(b) or Rule 10b-5. In the absence of an express federal statute of limitations, the Sixth Circuit, like most other courts of appeals, had held that private Rule 10b-5 actions were subject to limitations periods borrowed from state law. See, *e.g.*, *Carothers* v. *Rice*, 633 F.2d 7, 8-9 (6th Cir. 1980), cert. denied, 450 U.S. 998 (1981).

On June 20, 1991, while petitioners' action was pending before the district court, this Court issued its decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773 (1991). *Lampf* held that private actions under Section 10(b) are subject to a uniform federal limitations period drawn from Section 9(e) of the Exchange Act, 15 U.S.C. 78i(e). Under Section 9(e), a suit may not

be brought more than one year after the fraud is discovered or more than three years after it occurs. 111 S. Ct. at 2782. Having adopted that new limitations period for Section 10(b) actions, the Court applied the rule to the parties in *Lampf* itself. See *id.* at 2782; see also *id.* at 2785-2786 (O'Connor, J., dissenting).

On the same day that *Lampf* was decided, this Court also issued its decision in *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439 (1991). Under *Beam*, if the Court in a civil case applies a new interpretation of the law in the decision that announces it, courts must apply that interpretation of law to all other pending cases, even if the change in interpretation was not foreseeable and the parties had reasonably relied on prior judicial interpretations. The effect of *Beam* was to make *Lampf*'s view of the governing limitations period applicable to all pending Section 10(b) actions, whether or not the plaintiffs in those cases had relied on settled precedents establishing longer limitations periods. In August 1991, relying on *Lampf* and *Beam*, the district court dismissed petitioners' federal securities claims as time-barred and entered final judgment against petitioners. Petitioners did not appeal the judgment,[1] and the time for appeal expired in September 1991. Pet. App. 5a, 32a.

2. In December 1991, four months after the dismissal of the federal securities claims in this case, Congress enacted legislation adding Section 27A, 15 U.S.C. 78aa-1 (Supp. IV 1992), to the Exchange

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[1] As the court of appeals noted, petitioners "did not file what they believed (correctly) would have been a meritless and indeed sanctionable appeal." Pet. App. 5a.

Act. See Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 476, 105 Stat. 2387. Section 27A represents Congress's decision to protect victims of federal securities fraud who filed suit within the limitations periods set by pre-*Lampf* precedents, but whose suits were retroactively rendered untimely by the Court's decisions in *Lampf* and *Beam*.

Section 27A applies to private Section 10(b) actions that were commenced before June 20, 1991, the date that *Lampf* and *Beam* were decided. With respect to such actions, Section 27A(a) provides that the limitations period "shall be the * * * period provided by the laws applicable in the jurisdiction * * * as such laws existed on June 19, 1991," the day before *Lampf* was decided. 15 U.S.C. 78aa-1(a) (Supp. IV 1992). In jurisdictions (such as the Sixth Circuit) that applied a longer limitations period before *Lampf*, Section 27A has the effect of changing the governing law by substituting the longer limitations period for the "1-and-3" period that *Lampf* borrowed from Section 9(e) of the Exchange Act.

When Section 27A became law, many of the actions that were rendered untimely under *Lampf* were still pending in the federal system, either in the district courts or on appeal. Those pending cases are addressed by Section 27A(a), which is not at issue in this case.[2] Some suits, however, had been dismissed

[2] The courts of appeals have uniformly sustained the constitutionality of Section 27A(a). See *Cooperativa de Ahorro y Credito Aguada* v. *Kidder, Peabody & Co.*, 993 F.2d 269 (1st Cir.), petition for cert. pending, No. 93-564 (filed Oct. 12, 1993); *Axel Johnson Inc.* v. *Arthur Andersen & Co.*, 6 F.3d 78 (2d Cir. 1993); *Cooke* v. *Manufactured Homes, Inc.*, 998 F.2d 1256 (4th Cir. 1993); *Berning* v. *A.G. Edwards & Sons*,

on the basis of *Lampf* and had not been appealed within the 30-day time limit imposed by Congress on private civil appeals. See 28 U.S.C. 2107 (1988 & Supp. IV 1992). To account for such cases, Congress enacted Section 27A(b), the provision at issue here.[3]

Section 27A(b) provides a mechanism for the reinstatement of actions that had been "dismissed as time barred" following this Court's decision in *Lampf*. 15 U.S.C. 78aa-1(b) (Supp. IV 1992). During a 60-day period beginning on December 19, 1991, the date of Section 27A's enactment, plaintiffs whose suits had been the subject of such dismissals could file motions seeking reinstatement. A district court presented with a reinstatement motion under Section 27A(b) must consider the timeliness of the suit by applying "the limitation period provided by the laws applicable in the jurisdiction" before *Lampf*. 15

990 F.2d 272 (7th Cir. 1993); *Gray* v. *First Winthrop Corp.*, 989 F.2d 1564 (9th Cir. 1993); *Anixter* v. *Home-Stake Prod. Co.*, 977 F.2d 1533 (10th Cir. 1992), cert. denied, 113 S. Ct. 1841 (1993); *Henderson* v. *Scientific-Atlanta, Inc.*, 971 F.2d 1567 (11th Cir. 1992), cert. denied, 114 S. Ct. 95 (1993).

[3] Before enacting Section 27A, Congress obtained a memorandum from the American Law Division of the Congressional Research Service (CRS) regarding the constitutional issues raised by the bill that became Section 27A. See CRS *Memorandum* (Sept. 26, 1991), *reprinted in Securities Investor Protection Act of 1991: Hearings on S. 1533 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 102d Cong., 1st Sess. 374-379 (1991). The CRS memorandum concluded that the bill would survive review under the "rational basis test" and that the bill's effect on "final judicial orders" would not violate the separation of powers doctrine, "the controlling consideration appearing to be whether the congressional enactment is 'outcome determinative.'" CRS *Memorandum*, at 6.

U.S.C. 78aa-1(b) (Supp. IV 1992). If the court determines that the suit is timely under that limitations period, the court is required to reinstate the action; if the court determines that the suit remains untimely, the motion for reinstatement is denied.

3. In February 1992, within the prescribed 60-day period, petitioners moved to reinstate their claims under Section 27A(b). In April 1992, the district court denied the reinstatement motion. The court acknowledged that petitioners satisfied the statutory requirements for reinstatement under subsection (b), but held that subsection (b) violates the Constitution's separation of powers and the Due Process Clause of the Fifth Amendment. Pet. App. 33a-39a.

Petitioners appealed from the denial of their reinstatement motion, and the United States intervened, pursuant to 28 U.S.C. 2403, to defend the constitutionality of subsection (b) of Section 27A.[4] The court of appeals affirmed. Relying on *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), the court held that Section 27A(b) violates the separation of powers doctrine. Pet. App. 5a-27a. According to the court, Section 27A(b)'s reopening of final judgments of federal courts in cases involving private parties constitutes an exercise by Congress of the judicial power. Pet.

[4] When the constitutionality of an Act of Congress "affecting the public interest" is called into question in a federal suit to which the United States is not a party, courts are directed to "permit the United States to intervene for presentation of evidence * * * and for argument on the question of constitutionality." 28 U.S.C. 2403(a). Because the United States intervened as a party in the court of appeals in this case, it is a respondent in this Court. Sup. Ct. R. 12.4. The government is submitting this brief as a respondent in support of petitioners' position, pursuant to the Rules of this Court. *Ibid.*

App. 13a-14a, 27a. The court did not address the constitutionality of subsection (b) under the Due Process Clause. Pet. App. 14a n.12.

SUMMARY OF ARGUMENT

I. Section 27A(b) of the Securities Exchange Act of 1934 does not violate the separation of powers doctrine. While it has long been established that the decisions of Article III courts are not subject to review and reversal by another branch, and that Article III courts may not be assigned the nonjudicial function of making advisory recommendations to other Branches, Section 27A(b) infringes neither of those constitutional concerns. Section 27A(b) does not place the Legislative or Executive Branch in the role of reviewing the merits of the decisions of federal courts, and it does not reverse the holdings of federal courts. Nor does Section 27A(b) convert judicial decisions into nonbinding recommendations or advisory opinions.

In Section 27A(b), Congress legislated a new statute of limitations for the class of securities fraud cases that had been dismissed in light of this Court's adoption of a new (and in many cases shorter) federal limitations period for implied Section 10(b) claims. Congress also provided a procedural vehicle for reinstating dismissed cases in order for the new law to be applied by the courts. Congress's actions were an exercise of legislative, not judicial, power. And, under Section 27A(b), courts have only judicial functions to perform: the application of law to fact in particular cases and the rendering of judgments on the merits.

Nothing in Section 27A(b) undermines the institutional mission of the Article III courts to determine

facts and to interpret and apply the governing law in particular cases. Nor does the reopening of the class of judgments covered by Section 27A(b) constitute a threat to judicial independence. Procedurally, Section 27A(b) is analogous to Fed. R. Civ. P. 60(b). Substantively, the provision is no different in effect than the creation of a new federal cause of action with a longer statute of limitations. Neither history nor this Court's decisions cast doubt on the validity of legislation of that character. In sum, Section 27A(b) respects the division between legislative and judicial functions that the Constitution requires.

II. Section 27A(b) does not violate the Due Process Clause. Under this Court's jurisprudence, economic legislation that impinges on property interests is constitutional if it has a rational basis and serves a legitimate government interest. The notion that "vested rights" in a judicial judgment are immune to government regulation finds no support in modern cases, which recognize that Congress may affect property interests through retroactive, as well as prospective, legislation. The Court has specifically rejected the claim that rights represented by a judgment, alone of all property rights, are exempt from rational regulation. Here, Section 27A(b) is justified because it is a reasonable measure to protect the interests of victims of securities fraud whose cases retroactively became untimely.

Even if Section 27A(b) were analyzed under older decisions describing a "vested rights" doctrine, however, the provision is constitutional. If there were any special protection for judgments under those cases, a judgment such as the one here, which represents a finding only that a now-superseded limitations period had run, would be the least worthy of constitutional protection. In any event, this Court's vested rights cases have always acknowledged that a legislature may provide for further judicial review of a judgment, even after the time for appeal has run. And those cases further hold that it does not violate due process for the legislature to provide new substantive rules of decision for application in the new review proceedings. Those cases establish that the concept of "vested rights" does not invalidate provisions, like Section 27A(b), that provide for further review of a claim, notwithstanding a prior judgment, in light of new substantive law.

ARGUMENT

SECTION 27A(b) OF THE SECURITIES EXCHANGE ACT OF 1934 IS CONSTITUTIONAL

I. SECTION 27A(b) DOES NOT VIOLATE THE SEPARATION OF POWERS UNDER THE CONSTITUTION

Section 27A(b) provides a mechanism for reinstatement of a limited class of securities fraud cases based on an application of a change in the governing statute of limitations; it does not adjudicate the timeliness of those actions under the revised law, and it does not dictate the ultimate judgments to be rendered. Nevertheless, relying on principles announced in *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), the court of appeals concluded that Section 27A(b) crosses the constitutional line that separates the legislative power under Article I from the judicial power under Article III. Section 27A(b), however, does not raise the constitutional concerns considered in *Hayburn's Case*. Section 27A(b) neither involves an attempted exercise of the judicial power by another

Branch of the government, nor requires the federal courts to exercise the non-judicial function of rendering a decision subject to review in another Branch. Nor does Section 27A(b) violate general separation of powers principles, or the historical understanding of Article III's purposes.

A. Section 27A(b) Is Consistent With The Principles Of *Hayburn's Case*

The basic separation of powers principles invoked by the court of appeals trace their source to *Hayburn's Case*. The constitutional concerns expressed in *Hayburn's Case*, however, do not apply to Section 27A(b).

1. *Hayburn's Case* involved the administration of a pension statute for disabled Revolutionary War veterans. Act of Mar. 23, 1792, ch. 11, 1 Stat. 243. Under that statute, the circuit courts created by the Judiciary Act of 1789 were directed to examine pension applicants to determine the nature and degree of their disability, and to "transmit the result of their inquiry" to the Secretary of War, if "in their opinion, the applicant should be put on the pension list." § 2, 1 Stat. 244. The Secretary of War, in turn, was authorized to "withhold the name of such applicant from the pension list, and make report * * * to Congress," in any case in which he had "cause to suspect imposition or mistake." § 4, 1 Stat. 244. The statute thus subjected a circuit court's ruling that an applicant should be put on the pension list to revision and reversal by the Secretary of War.

Hayburn's Case itself became moot before this Court had occasion to address the constitutionality of the pension statute. See 2 U.S. (2 Dall.) at 409-410; Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (repealing challenged provision). Five of the six Justices of this Court, however, expressed their views on the statute in their capacity as circuit judges.[5] Those views, which are collected in the report of *Hayburn's Case*, 2 U.S. (2 Dall.) at 410-414, "have since been taken to reflect a proper understanding of the role of the Judiciary under the Constitution." *Morrison* v. *Olson*, 487 U.S. 654, 677 n.15 (1988).

All of the Justices who considered the statute stated that the Constitution did not authorize review and revision of the judgments of federal courts by the Executive or Legislative Branch. Chief Justice Jay and Justice Cushing stated that "by the Constitution, neither the Secretary at War, nor any other Executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court." 2 U.S. (2 Dall.) at 410. Justices Wilson and Blair likewise concluded that the "revision and controul" of judicial judgments by the Executive and Legislative Branches conflicted "with the independence of that judicial power which is vested in the courts." *Id.* at 411. And Justice Iredell concluded that "no decision of any court of the United States can, under any circumstances * * * agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments." *Id.* at 413.

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[5] Circuit courts for the districts of New York, Pennsylvania, and North Carolina addressed the validity of the law, and each panel wrote letters to the President to express its views. See Maeva Marcus and Robert Teir, Hayburn's Case: *A Misinterpretation of Precedent*, 1988 Wis. L. Rev. 527, 529-534.

The opinions in *Hayburn's Case* reflect two related Article III concerns. First, because the Constitution vests "the judicial Power" exclusively in the federal courts, neither the Executive Branch nor Congress may act as a "court of errors," *Hayburn's Case*, 2 U.S. (2 Dall.) at 410, by reviewing the judgments of Article III courts. Second, Article III precludes the federal courts themselves from carrying out "any duties, but such as are properly judicial * * *." *Ibid.* Because "the judicial Power" reposed in the courts by Article III, § 1, contemplates the authority to find facts and determine the rights of the parties under the law, a statute like the one in *Hayburn's Case*, which called on Article III courts to make nonbinding recommendations, requires the courts to play a role that "is not judicial."[6] *Hayburn's Case*, 2 U.S. (2 Dall.) at 410.

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[6] In *Hayburn's Case*, Chief Justice Jay and Justice Cushing construed the statute as an invitation to federal judges to "execute this act in the capacity of commissioners," 2 U.S. (2 Dall.) at 410, on the theory that individual members of the federal judiciary may carry out non-Article III responsibilities by accepting appointment to nonjudicial offices. The other Justices declined to exercise the jurisdiction conferred by the statute, *id.* at 411-414, and Chief Justice Jay and Justice Cushing later concluded that the statute did not authorize them to act as commissioners. See *United States* v. *Ferreira*, 54 U.S. (13 How.) 40, 49-50, 52-53 (1851) (discussing *Hayburn's Case* and the Court's subsequent consideration of the same statute in the unreported decision of *United States* v. *Yale Todd* (1794)). While inviting or requiring Article III judges to serve as commissioners might raise the question whether such an assignment is consistent with Article III, cf. *Mistretta* v. *United States*, 488 U.S. 361, 402-404 (1989), that issue was not examined in *Hayburn's Case* and is not involved here.

2. The principles of independent judicial decisionmaking voiced in *Hayburn's Case* are not threatened by Section 27A(b). Section 27A(b) neither places another Branch as a "court of errors" in review of decisions rendered by Article III courts, nor requires federal courts to carry out functions that are not "judicial" in character.

a. Section 27A(b) does not constitute an exercise by Congress of the "judicial Power" conferred on the Article III courts. In enacting Section 27A(b), Congress did not "sit as a court of errors," *Hayburn's Case*, 2 U.S. (2 Dall.) at 410, to review the validity of judicial judgments under existing rules of decision. Instead, Congress exercised its "legislative Powers" by passing a law, in response to *Lampf*, that prescribes a new rule of decision to be applied by the courts. See *Robertson* v. *Seattle Audubon Society*, 112 S. Ct. 1407 (1992); see also *Rivers* v. *Roadway Express, Inc.*, 114 S. Ct. 1510, 1515 (1994) ("Congress may * * * decide to announce a new rule that operates retroactively to govern the rights of parties whose rights would otherwise be subject to the rule announced in the judicial decision."). Section 27A(b) changes the limitations periods for pre-*Lampf* Section 10(b) cases, see *Musick, Peeler & Garrett* v. *Employers Ins. of Wausau*, 113 S. Ct. 2085, 2089 (1993); provides a vehicle for application of that law to dismissed cases; and leaves to the courts the judicial functions of finding facts in particular cases, applying the new limitations periods to those facts, and, in cases that are found timely, to adjudicate the merits of the controversy. The provision thus preserves for the courts "[t]he essence of judicial decisionmaking—applying general

rules to particular situations[.]" *Rivers* v. *Roadway Express, Inc.*, 114 S. Ct. at 1519.

Section 27A(b) is fundamentally different from the pension statute in *Hayburn's Case*. That law prescribed the legal standards to be applied by the courts regarding eligibility for military pensions, but authorized the Secretary of War to overturn the decisions of federal courts on a case-by-case basis if the Secretary had cause "to suspect imposition or mistake" in the court's determinations under existing law. Executive review of judicial action in particular cases involves impermissible oversight of the decisions of the courts. Section 27A(b), in contrast, does not involve any oversight of the way in which courts have applied law to fact in particular cases. The prior judgments are to be reopened because the law has changed and courts applying the new law have found the conditions for reopening satisfied, not because Congress determined in individual cases that the courts had applied prior law incorrectly.[7]

It would be one thing if Congress enacted a self-executing statute that purported to set aside the judgment of a court. Section 27A(b), however, does

[7] The court of appeals therefore erred in stating that "[i]f the statute which gave rise to *Hayburn's Case* violated the Constitution, then § 27A(b) cannot stand, *a fortiori*," because "[i]n enacting § 27A, Congress has not simply reserved such power [to sit as a 'court of errors'], as in *Hayburn's Case*, but actually exercised it." Pet. App. 13a-14a. Section 27A(b) does not represent the exercise by Congress of powers belonging to a court of errors. Rather, Section 27A(b) provides a vehicle for courts to apply a change in the governing law that is within Congress's power to enact—a statute of limitations. To designate the class of cases that will be governed by a change in statutory law is a legislative, not a judicial, function.

not of its own force reopen any judgments. Under Section 27A(b), the plaintiff must file a motion with the court invoking the legal standards provided by Section 27A; the court then applies those standards. A remedy that requires a court, on motion of a party, to reopen a judgment in order to apply new law does not usurp the judicial power. As this Court has held, establishing a procedural avenue to have a new legal standard applied to a case is a legislative, not a "judicial," function. *Sampeyreac* v. *United States*, 32 U.S. (7 Pet.) 222, 239 (1833) (statute authorizing court to "reverse and annul any prior decree or adjudication" that is found to rest on forged evidence, whether or not the prior judgment was final and conclusive between the parties, "is in no respect the exercise of judicial powers"); see also *Freeborn* v. *Smith*, 69 U.S. (2 Wall.) 160, 175 (1864) (act restoring lapsed right to Supreme Court review of territorial court decisions, after the territory became a State, was "of a remedial character, and * * * the peculiar subject[] of legislation. [It was] not liable to the imputation of being [the] assumption[] of judicial power.").[8]

b. Section 27A(b) does not require federal courts to play a role that "is not judicial." *Hayburn's Case*, 2 U.S. (2 Dall.) at 410. The task assigned to district courts by Section 27A(b) is a fundamentally judicial one—that of finding facts and applying a

[8] *Sampeyreac* and *Freeborn* involved prior judgments of territorial courts. The Court's conclusion, however, that the statutes involved in those cases did not involve exercises of judicial power by Congress, but constituted proper forms of legislation, did not turn on the nature of the tribunal that had rendered the judgments. Those holdings turned, rather, on the nature of the statutes at issue.

legal rule (the statute of limitations) to a controversy between the parties. The courts, not Congress, determine the effect of the legal rule in the circumstances of a particular case. Nothing in Section 27A(b) precludes a court from denying reinstatement in an individual case, if it determines either that "the law[] applicable in the jurisdiction" before *Lampf* provides the same limitations period adopted in *Lampf*, or that the suit was untimely even under a different limitations period. And, if the court finds the suit timely, Section 27A(b) has no effect on the way a court will resolve the merits of the securities fraud claim itself. The ultimate judgment to be rendered remains within the control of the judiciary.

Section 27A(b) does, of course, require courts to reinstate cases that have been dismissed, if they have first determined that the suits are timely under the new limitations period prescribed by Congress. But a law providing a reopening remedy is not analogous to a law requiring the courts to render nonbinding determinations, as in *Hayburn's Case*. The prior determination of the district court in this case was that the statute of limitations, as decreed by *Lampf*, barred this action. Congress has not "reviewed" that conclusion under the rule of *Lampf*, or "reversed" the district court's holding. Rather, Congress has provided a procedure for the district court to reinstate the action if the new statute of limitations is satisfied, and then to adjudicate the case on the merits. 15 U.S.C. 78aa-1(b) (Supp. IV 1992).

In concluding that the statute in *Hayburn's Case* required the courts to assume a role that "is not judicial," 2 U.S. (2 Dall.) at 410, Chief Justice Jay articulated concerns that resemble those underlying the prohibition against advisory opinions. See *Muskrat* v. *United States*, 219 U.S. 346, 352-353, 361-362 (1911). Federal courts cannot be required to give "an expression of opinion" on an issue of law, when the judgment will not affect the rights of parties. *Id.* at 362. Section 27A(b), however, does not convert the judgments rendered in the underlying Section 10(b) cases into advisory opinions. See 13 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3529.1, at 302, 306-307 (2d ed. 1984) (distinguishing the justiciability issues raised in cases such as *Hayburn's Case* from "cases dealing with the power of Congress to upset the results of final judicial judgments by legislation adopted *after* judgment"). Those judgments finally determined the application of prior limitations law to the cases at hand. Section 27A changes that law, and that change is the reason for reopening the judgment. A prior judgment is not rendered "advisory" in the Article III sense when a court is obligated to revise it as a consequence of legislation enacted *pendente lite*, see *United States* v. *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), and it is not rendered "advisory" when the parties' legal rights are altered by legislation enacted after the litigation has concluded, see *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855).

B. Section 27A(b) Is Consistent With Broader Separation Of Powers Principles

Section 27A(b) is also constitutional when considered in light of the broader purposes of the Constitution's separation of powers. Because Article III protects the independence of courts and the right of litigants to politically independent adjudicators, *Com-*

modity Futures Trading Commission v. *Schor*, 478 U.S. 833, 848, 850 (1986), this Court has guarded against a "provision of law [that] impermissibly threatens the institutional integrity of the Judicial Branch." *Mistretta* v. *United States*, 488 U.S. 361, 383 (1989) (citations and internal quotation marks omitted). Section 27A(b) does not threaten the independence or institutional integrity of the Judicial Branch, because it does not constitute an impermissible intrusion on the courts' power to decide cases or to enter judgments.

1. The Constitution contains a variety of restrictions that prevent Congress from engaging in adjudicatory functions assigned to the Article III courts. The prohibitions against "ex post facto Law[s]" [9] and "Bill[s] of Attainder" [10] prevent Congress from

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[9] Art. I, § 9, Cl. 3. The Ex Post Facto Clause, applicable solely to criminal laws, *Calder* v. *Bull*, 3 U.S. 3 (3 Dall.) 386 (1798), protects against "arbitrary and potentially vindictive legislation," *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981), which may represent "the use of the political process to punish or characterize past conduct of private citizens." *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1498 n.20 (1994). The Clause thus represents a judgment that "[i]t is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers[.]" *Ibid.*

[10] Art. I, § 9, Cl. 3. The prohibition against bills of attainder bars "legislative Acts inflicting punishment." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 474 (1977). "Just as Art. III confines the Judiciary to the task of adjudicating concrete 'cases or controversies,' so too the Bill of Attainder Clause was found to 'reflect . . . the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.'" *Id.* at 469, quoting *United States* v.

"singling out disfavored persons and meting out summary punishment for past conduct." *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1497 (1994).[11] The principles of *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 146-147 (1872), prevent Congress, in certain contexts, from directing a decision in a pending case.[12] And Congress may not assign certain ad-

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Brown, 381 U.S. 437, 445 (1965). As *Brown* recognized, the Clause is thus an aspect of the "separation of powers." 381 U.S. at 442-443.

[11] "The linking of bills of attainder and *ex post facto* laws is explained by the fact that a legislative denunciation and condemnation of an individual often acted to impose retroactive punishment." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 468 n.30 (1977).

[12] In *Klein*, suit was brought to recover private property sold by the United States during the Civil War. Proof that the property owner had not aided the rebellion was made by showing that he had received a Presidential pardon. Congress then enacted a law providing that the receipt of the pardon was proof of disloyalty, rather than loyalty, and that this Court was required to dismiss any appeal in a case in which the plaintiff had established his loyalty through a pardon. This Court held that the law's limitation on the Supreme Court's jurisdiction and Congress's regulation of the effect of the Presidential pardon violated the Constitution. 80 U.S. (13 Wall.) at 146-148. There is considerable question about the scope and rationale of *Klein*. See Paul M. Bator, Paul J. Mishkin, Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler's The Federal Courts and The Federal System*, 369 & n.4 (3d ed. 1988). Even if the case were read broadly, however, as invalidating a statutory rule of decision requiring a court to decide a pending case in a particular way, but see *Robertson* v. *Seattle Audubon Society*, *supra*; *Pope* v. *United States*, 323 U.S. 1, 8-10 (1944), *Klein* would be inapplicable here. Section 27A(b) does not dictate the outcome of any particular Section 10(b) case, nor does it require courts to

judicatory functions to non-Article III decision-makers. See, *e.g.*, *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Those protections are not violated by Section 27A(b). Section 27A(b) does not single out particular persons for punishment. It does not dictate the decision on the merits of a particular case. And it does not transfer responsibility for deciding cases to another Branch of the government.

The court of appeals stated that "if Congress may by legislation reverse or vacate the final judgments of Federal courts, then Congress has rendered the whole function of the judiciary futile: whether 'the *whole* power of one department is exercised by the hands which possess the *whole* power of another department,' *Mistretta*, 488 U.S. at 381 (quoting *The Federalist* No. 47 (Madison)) is left subject only to the self-restraint of the legislature." Pet. App. 25a. Section 27A(b), however, does not usurp even part of a power that the judiciary exclusively possesses, let alone the "whole power of another department." The courts retain their fact-finding and law-application roles under Section 27A(b); Congress has simply specified the class of cases to which that law applies.

make particular findings of fact or applications of law. Section 27A(b) is more general in operation that the law at issue in *Robertson* v. *Seattle Audubon Society*, *supra*, which was directed at only two pending cases. The Court's holding in *Robertson*, 112 S. Ct. at 1414—that when Congress "amend[s] applicable law," its action does not implicate the principles underlying *Klein*—applies here as well. The court of appeals itself recognized that its objection to Section 27A(b) was that it "forces the courts to rule again on cases they have dismissed with prejudice, not that it forces the courts to rule on those cases (or any cases) in a particular way." Pet. App. 21a n.14.

2. Nor does Section 27A(b) have "practical consequences" that raise constitutional difficulties "in light of the larger concerns that underlie Article III." *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. at 857. The Constitution does not generally address the nature and degree of finality that a federal judgment will have.[13] It might be suggested that an Act of Congress totally abrogating the finality of all federal court judgments would raise Article III concerns. Such a law might be vulnerable to the objection that it undermined the judiciary's institutional mission as a forum for decision of cases and controversies, and, at the same time, it is difficult to imagine a sufficient legislative justification for such a law. Cf. *Schor*, 478 U.S. at 885. Section 27A(b), however, does not work a wholesale aboli-

[13] The Double Jeopardy Clause of the Fifth Amendment, perhaps the Constitution's only specific requirement of finality with respect to a judgment, prevents Congress from requiring multiple trials for the same criminal offense after a defendant's prior acquittal or conviction. Insofar as that provision protects judgments per se, its protection is confined to the criminal sphere. See, *e.g.*, *United States* v. *Wilson*, 420 U.S. 332, 343 (1975). The Full Faith and Credit Clause, Article IV, § 1, requires "every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it." *Durfee* v. *Duke*, 375 U.S. 106, 109 (1963). That Clause does not impose independent standards of finality for judgments. And it does not apply to federal judgments at all; those judgments are addressed by 28 U.S.C. 1738. See *Stoll* v. *Gottlieb*, 305 U.S. 165, 170 (1938).

tion of the finality of judgments,[14] and it is supported by a substantial legislative justification.[15]

Section 27A(b) defines a discrete class of cases consisting of securities fraud actions that were deemed timely under pre-*Lampf* limitations law, that were dismissed as untimely solely on the basis of

[14] Nor does it abolish the common-law principle of res judicata that a final judgment is generally not subject to reopening based on subsequent judicial decisions. See *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981).

[15] This Court has described res judicata as a "common-law doctrine[ ]," and has stated that "[c]ourts do not, of course, have free rein to impose rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand." *Astoria Federal Savings & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 107-108 (1991); see also *Williams* v. *Amroyd*, 11 U.S. (7 Cranch) 423, 433-434 (1813). Moreover, there are contexts in which federal courts themselves have found that res judicata principles have no force in protecting judgments. See *McCleskey* v. *Zant*, 499 U.S. 467, 479-488 (1991); *Sanders* v. *United States*, 373 U.S. 1, 7 (1963) ("[a]t common law, the denial by a court or judge of an application for habeas corpus was not *res judicata*"; applying that principle under 28 U.S.C. 2255); see also *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (Congress delegated to the Sentencing Commission the power "to decide whether and to what extent its amendments reducing sentences [presumably covered by valid final judgments] will be given retroactive effect"). Whether or not any constitutional problems would be raised by a total abolition of res judicata in the ongoing adjudication of cases in the federal judicial system, the limited effect on finality occasioned by Section 27A(b) does not raise such problems. See *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. at 852 (while "wholesale importation of concepts of pendent or ancillary jurisdiction into the agency context may create greater constitutional difficulties" under Article III, the Court will not require an "absolute prohibition * * * out of fear of where some hypothetical 'slippery slope' may deposit us").

Lampf, and that went to final judgment because the plaintiffs did not file "meritless and indeed sanctionable" appeals. Pet. App. 5a. Congress's determination that those plaintiffs should have an opportunity to litigate the merits of their complaints in federal court impairs neither the "independent" judiciary nor the right of litigants to a judge free from "potential domination by other branches of government." *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. at 848. This is true whether Section 27A(b) is regarded as a modification of procedure or as the creation of new substantive rights.

a. As a matter of procedure, Congress's provision for the reopening of certain judgments because of a change in the limitations period is a small variation on current practice. Rule 60(b) of the Federal Rules of Civil Procedure embodies longstanding principles providing for the setting aside of the final judgment of a federal district court in appropriate circumstances. See 7 James Wm. Moore, *Moore's Federal Practice* ¶¶ 60.09-60.27, at 60-65 to 60-306 (2d ed. 1993); see also page 36, *infra*. While Rule 60(b) was adopted by this Court (pursuant to 28 U.S.C. 2072-2074), Article III does not bar Congress from identifying additional circumstances requiring reopening of a judgment when, in Congress's view, considerations akin to those that animated Rule 60(b) and its historical antecedents warrant that relief. "[J]udicial rulemaking" comes within a "twilight area" in the Constitution's allocation of powers among the three Branches, and this Court has long upheld congressional delegations of rulemaking power to federal courts. *Mistretta* v. *United States*, 488 U.S. at 386-387. The promulgation of court rules, however, "is nonjudicial in the sense that rules im-

pose standards of general application divorced from the individual fact situation which ordinarily forms the predicate for judicial action." *Id.* at 392. Accordingly, Congress, acting pursuant to its power to establish inferior federal courts (Art. I, § 8, Cl. 9) and the Necessary and Proper Clause (Art. I, § 8, Cl. 18), "has undoubted power to regulate the practice and procedure of federal courts." *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9 (1941); *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 22 (1825).

When Congress exercises its power to prescribe rules of judicial procedure, Article III does not prevent Congress from requiring, rather than simply permitting, the reopening of a judgment in specified circumstances. Indeed, when the legal standards are settled, Rule 60(b) itself imposes a non-discretionary duty on district courts to reopen particular judgments.[16] A provision requiring the reopening of final judgments in certain in rem actions has also long

[16] See *Printed Media Services, Inc.* v. *Solna Web, Inc.*, 11 F.3d 838, 842-843 (8th Cir. 1993) (judgment void for failure to serve party); *Carimi* v. *Royal Carribean Cruise Line, Inc.*, 959 F.2d 1344 (5th Cir. 1992) (same); *Thos. P. Gonzalez Corp.* v. *Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980) (default judgment against defendant protected by sovereign immunity); *Hopkins* v. *Coen*, 431 F.2d 1055, 1059 (6th Cir. 1970) (abuse of discretion to deny defendants' Rule 60(b) motion "where verdicts in the same case are inconsistent on their faces, indicating that the jury was either in a state of confusion or abused its power"); *Pittston Co.* v. *Reeves*, 263 F.2d 328 (7th Cir. 1959) (abuse of discretion to deny motion where dismissal was entered without notice to all members of plaintiff class as required by Fed. R. Civ. P. 23(c)).

been part of federal statutory law.[17] While Congress may not dictate the outcome of a particular case by specifying the facts to be found or by actually applying a legal rule to those facts, it may establish a procedure for the reopening of a judgment for further review within the court system without transgressing any constitutionally grounded concept of finality.

b. As a matter of substance, Section 27A(b) is no different in effect than the creation of a new right of action that duplicates the elements of Rule 10b-5, but that contains a new, and longer, statute of limitations.[18] Such a statute would raise no Article III concerns. See *Pope* v. *United States*, 323 U.S. 1, 9-10 (1944) (rejecting Article III challenge to statute creating new governmental obligation to pay claims, despite prior final judgment rejecting those claims).

[17] See 28 U.S.C. 1655 (providing that defendant who was not personally served (but was served by publication) in an action in rem may, within one year after final judgment, "enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just"); *Perez* v. *Fernandez*, 220 U.S. 224 (1911) (enforcing predecessor of Section 1655 without any suggestion that the statutory mandate that an otherwise final judgment be set aside violates the Constitution). Another example of a legislative reopening provision is contained in the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. 520(4).

[18] This Court, in Article III challenges, has often "[l]ook[ed] beyond form to the substance of what [a provision] accomplishes." *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568, 589 (1985); see also *Pope* v. *United States*, 323 U.S. 1, 9 (1944) (rejecting claim that "inartistically drawn" statute violated Article III, where its "purpose and effect" were permissible).

Congress is free to determine that the interest in having a claim heard and decided on the merits outweighs the equities and practical considerations that normally favor repose. And with the defense of res judicata removed from the case, the courts cannot decline to hear a case by invoking Article III. See *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 406-407 (1980).

In *Sioux Nation*, this Court rejected a separation of powers attack on a statute requiring the Court of Claims to entertain, "without regard to the defense of res judicata," an application by the Sioux Nation for further review of a takings claim that had previously gone to final judgment in favor of the United States. 448 U.S. at 391. The Court explained:

> When Congress enacted the amendment directing the Court of Claims to review the merits of the Black Hills [takings] claim, it neither brought into question the finality of that court's earlier judgments, nor interfered with that court's judicial function in deciding the merits of the claim. When the Sioux returned to the Court of Claims following passage of the amendment, they were there in pursuit of judicial enforcement of a new legal right. Congress had not "reversed" the Court of Claims' holding that the claim was barred by res judicata, nor, for that matter, had it reviewed the 1942 decision rejecting the Sioux' claim on the merits.

Id. at 406-407.

Contrary to the view of the court of appeals, the logic of *Sioux Nation* is not limited to cases in which Congress, in the exercise of its power to pay the Nation's debts, waives the res judicata effect of a judgment rejecting a claim against the United States.

Pet. App. 20a, 22a-23a. If res judicata were compelled by Article III to safeguard the structural independence of the courts, the doctrine would not be subject to waiver by any party litigant or in the exercise of any constitutional power. See *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. at 850-851 (parties cannot waive the structural principle of Article III that "prevent[s] the encroachment or aggrandizement of one branch at the expense of the other," because those "limitations serve institutional interests [of the courts] that the parties cannot be expected to protect"). The principles of Article III jurisprudence expressed in *Sioux Nation* are therefore applicable whenever Congress lifts the bar of res judicata in the exercise of a constitutionally granted power, such as the power to regulate commerce that is at issue here. See 15 U.S.C. 78b.

The reasoning of *Sioux Nation* thus establishes that a statute creating "a new legal right" to sue for securities fraud, with an extended statute of limitations, would not infringe the Article III power of the courts to render final judgments. The impact on the judicial system of adjudicating a hypothetical "new cause of action," however, is no different in substance from the impact of Section 27A(b)—except that a statute requiring the filing of new complaints to reinstitute the actions would have been more cumbersome. Because the courts' judicial role is not undermined by a congressional decision to authorize litigation of a "new claim" that was previously concluded by a judgment, Congress's choice to employ the procedural route of providing for reinstatement of a previously dismissed case does not violate Article III.

C. Section 27A(b) Does Not Conflict With The Historical Understanding Or Later Implementation Of Article III

The court of appeals believed that this Nation's experience with legislative usurpation of judicial powers in the eighteenth century leads to an understanding of Article III under which Section 27A(b) is invalid. Pet. App. 7a-10a. The historical underpinnings of Article III, however, do not suggest the existence of an overriding "finality" principle that absolutely precludes Congress from providing for reopening of a judgment for further review under a new legal rule. Nor does the interpretation of *Hayburn's Case* in decisions of this Court suggest the existence of such a principle.

1. The backdrop to the adoption of Article III was the exercise by colonial legislatures of powers that were understood to be judicial in nature. "In 1787 judicial interpretation of the law was often not final even in the decision of cases, it being common practice for the legislature, in the exercise of a species of equity jurisdiction, to reverse decisions of the ordinary courts, to order cases retried or appeals granted, and even to adjudicate controveries itself." Edward S. Corwin, *Court Over Constitution* 13-14 (1938); see Gordon S. Wood, *Creation of the American Republic* 154-155 (1969);[19] *Judicial Action by the Provincial Legislature of Massachusetts*, 15 Harv. L.

[19] "The assemblies constantly heard private petitions, which often were only the complaints of one individual or group against another, and made final judgments on these complaints. They continually tried cases in equity, occasionally extended temporary equity power to some common law court for a select purpose, and often granted appeals, new trials, and other kinds of relief." Gordon S. Wood, *supra*, at 154-155.

Rev. 208 (1901) (collecting examples of the 1708-1709 Massachusetts Legislature acting in a judicial capacity in particular cases). Madison singled out for criticism the practice of the Virginia and Pennsylvania legislatures rendering decision in specific cases, at the expense of the prerogatives of the courts. See James Madison, *The Federalist Papers*, No. 48, at 311 (C. Rossiter ed. 1961) (quoting Thomas Jefferson, *Notes on the State of Virginia* 120 (W. Peden ed. 1955); emphasis added by Madison)) (Virginia legislature "*decided rights* which should have been left to *judiciary controversy*"); *id.* at 312 (noting criticism by Council of Censors in Pennsylvania that "cases belonging to the judiciary department frequently [have been] drawn within legislative cognizance and determination").[20] Justice Powell has noted that, before the adoption of the Constitution, the rights of individuals were often determined in particular controversies through "trial by a legislature." *INS* v. *Chadha*, 462 U.S. 919, 961-962 (1983) (Powell, J., concurring). "[T]o prevent the recurrence of such abuses," Justice Powell concluded, "the Framers vested the executive, legislative, and judicial powers in separate branches." *Id.* at 962.

The independent Judicial Branch created by the Constitution was intended to free the federal courts from the sort of congressional or executive interference that had undermined pre-constitutional judges.

[20] Alexander Hamilton also expressed the view that the reversal of a judicial judgment in an individual case was not a proper legislative function. See Alexander Hamilton, *The Federalist Papers*, No. 81, at 484 (C. Rossiter ed. 1961) (emphasis added) ("A legislature, without exceeding its province, cannot reverse a determination once made in a *particular* case; though it may prescribe a new rule for future cases.").

The historical examples that excited the Framers' attention, however, were far more intrusive and quite different from Section 27A(b), because they were indistinguishable from the powers exercised by the courts themselves. Section 27A(b), in contrast to those exercises, does not withdraw a specific case from the courts, require a trial to be conducted before the legislature, or reverse a judicial determination based on a disagreement about the underlying facts or the application of existing law to those facts. The purpose and effect of the provision is to change the law and to permit, notwithstanding a prior judgment, the enforcement of substantive legal rights. Nothing in the history of Article III suggests that the Framers intended to prohibit legislation having that sort of impact on a judgment.

2. Because Section 27A(b) does not threaten the separation of powers principles articulated in *Hayburn's Case*, it is not surprising that none of this Court's decisions applying those principles casts doubt on the constitutionality of Section 27A(b). The statutes at issue in most of those cases, unlike the one in *Hayburn's Case* itself, provided for executive or legislative review of decisions of *non*-Article III tribunals. See *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1851); *Gordon* v. *United States*, 69 U.S. (2 Wall.) 561 (1864) (opinion of Chief Justice Taney); *In re Sanborn*, 148 U.S. 222 (1893); *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103 (1948). When presented with disputes arising under such statutes, this Court has regarded the exercise of executive or legislative review (as well as the initial assignment of adjudicatory tasks to non-Article III decisionmakers) as valid, and has held only that the availability of

executive or legislative review precludes judicial review by Article III courts.[21] In other cases applying the logic of *Hayburn's Case*, the Court held that executive or legislative revision was not available at all.[22]

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[21] See *United States* v. *Ferreira*, *supra* (federal court hearing claims for which United States was liable under treaty with Spain, whose decisions were subject to review by Secretary of the Treasury, was not exercising judicial power, and no appeal lay to Supreme Court); *Gordon* v. *United States*, *supra* (Court of Claims judgments, which may be paid only after Secretary of the Treasury estimates the claim, are not the exercise of judicial power); *In re Sanborn*, *supra* (Court of Claims' resolution of facts, rendered on referral from Executive Department and reported back to that Department, is not within class of cases that are by statute subject to Supreme Court review); *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. at 112-114 (federal court may not review administrative order granting or denying application for foreign air route, where the President has final authority to approve or disapprove agency's action). See also *District of Columbia* v. *Eslin*, 183 U.S. 62, 65 (1901) (declining to review Court of Claims decision in light of intervening legislation providing that Congress would not pay the judgment).

[22] *See United States* v. *O'Grady*, 89 U.S. (22 Wall.) 641 (1874) (government could not reduce judicially determined debt by applying, as an offset, an asserted claim that the government possessed, but had failed to assert as a counterclaim); *United States* v. *Waters*, 133 U.S. 208, 213 (1890) (award of counsel fees to district attorney by Court of Claims was "a judicial act of a court of competent jurisdiction, [and] was not subject to the reexamination or reversal of the Attorney General"); *United States* v. *Jefferson Elec. Mfg. Co.*, 291 U.S. 386 (1934) (under statute defining its jurisdiction, Court of Claims, when hearing a tax refund claim, is required to resolve all elements of the claim; it cannot render a judgment subject to later proof of one element to the IRS).

None of those cases has application here. As described above, Section 27A(b) does not authorize review of merits adjudications in securities cases by executive or legislative officials. Nor has any executive or legislative official claimed the right to make such a determination. Unlike a statute that gives final authority to determine the outcome of an individual case to another Branch, Section 27A(b) contemplates final resolution of federal securities claims by the courts. In sum, the limited right conferred by Section 27A(b) to have a final judgment reopened does not violate the separation of powers.

II. SECTION 27A(b) DOES NOT VIOLATE THE DUE PROCESS CLAUSE

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be * * * deprived of life, liberty, or property, without due process of law." There is no foundation to the view that the Due Process Clause prohibits alteration of all interests determined by a judgment, and Congress did not violate the due process rights of securities fraud defendants by providing for the revival of Section 10(b) actions previously held to be time-barred.

A. The Due Process Clause Protects Property Interests, Not "Vested Rights"

1. By its terms, the Due Process Clause speaks of "life," "liberty," and "property," not "vested rights." See *Campbell* v. *Holt*, 115 U.S. 620, 628 (1885) ("[T]he word[s] 'vested right' [are] nowhere used in the constitution, neither in the original instrument nor in any of the amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to in-

corporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the constitution."). While courts occasionally characterize certain interests as "vested rights," see, *e.g.*, *Landgraf* v. *USI Film Products*, 114 S. Ct. at 1499; *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981), at most, those rights are a form of "property" for due process purposes. The characterization of property rights as "vested" does not immunize those rights from the normal due process test that applies to legislation that regulates economic rights. See *United States* v. *Locke*, 471 U.S. 84, 104 (1985) ("Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties."). Rather, a finding that a right has "vested" in some sense appears only to be a precondition for application of the Due Process Clause. *Weaver* v. *Graham*, 450 U.S. at 29-30; see *Board of Regents* v. *Roth*, 408 U.S. 564, 576-577 (1972).

The Due Process Clause does not prohibit deprivations of property; it requires only that deprivations be accompanied by "due process of law." In the realm of social and economic legislation, due process demands only that the legislature pursue a legitimate public purpose and that the impact on private property interests be rationally related to the public ends of the law. See, *e.g.*, *United States* v. *Carlton*, No. 92-1941 (June 13, 1994); *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2286-2287 (1993); *Usery* v.

Turner Elkhorn Mining Co., 428 U.S. 1 (1976). By the same token, the Due Process Clause does not foreclose legislatures from affecting property interests through retroactive laws. *United States* v. *Carlton*, *supra*, slip op. 4-5; *Landgraf* v. *USI Film Products*, 114 S. Ct. at 1501 ("the *constitutional* impediments to retroactive civil legislation are now modest"). The burden of sustaining retroactive legislation under the Due Process Clause is "met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); *United States* v. *Sperry Corp.*, 493 U.S. 52, 64-65 (1989).

Because retroactive laws can pose "problems of unfairness that are more serious than those posed by prospective legislation," *General Motors Corp.* v. *Romein*, 112 S. Ct. 1105, 1112 (1992), the Court has employed a "presumption against retroactivity" that "allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes." *Landgraf* v. *USI Film Products*, 114 S. Ct. at 1501; *Rivers* v. *Roadway Express, Inc.*, 114 S. Ct. at 1514. But "the test of due process" for the retroactive aspects of [economic] legislation, as well as the prospective aspects," is whether they advance "a legitimate legislative purpose * * * by rational means." *Romein*, 112 S. Ct. at 1112. Retroactive legislation that meets those standards satisfies the Due Process Clause "even though the effect of the legislation is to impose a new duty or liability based on past acts." *Usery*, 428 U.S. at 16; *Romein*, 112 S. Ct. at 1112; *Sperry*, 493 U.S. at 64-65.

There is no exception to that due process principle for so-called "vested rights" in a judgment. Quite

apart from the absence of any constitutional text supporting the claim that rights or interests addressed by a judgment enjoy absolute immunity from retroactive legislation, the claim to special treatment for judgments is analytically unsound. If the expectation interests in enforcing private contracts, see *National R.R. Passenger Corp.* v. *Atchison, T. & S.F. Ry.*, 470 U.S. 451, 472 (1985), other property rights, see *United States* v. *Locke*, 471 U.S. at 104-105, or settled rules of the common law, *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978), do not impose an absolute barrier to change by legislation, a judgment, which simply confirms rights already reflected in the law, has no greater claim to inviolability. Most retroactive legislation can be said to upset expectation interests. When a legislature imposes monetary liability retroactively, and thereby compels an individual to assume liability that did not exist when the relevant acts occurred, see, *e.g.*, *Usery*, 428 U.S. at 17, the effect on the individual's expectations can be quite dramatic. If that effect is permissible, so too is legislation that retroactively regulates expectation interests arising from a judgment.

Any suggestion that rights "vested" by a final judgment lie beyond the regulatory authority of Congress cannot be squared with this Court's decision in *Fleming* v. *Rhodes*, 331 U.S. 100 (1947). In that case, landlords obtained valid state court judgments of eviction during a gap in the application of federal price control statutes. *Id.* at 101-102. When the price controls were reinstated, federal law made them retroactive and precluded evictions under the prior judgments. *Id.* at 102 n.3. Relying on the theory that "the vested rights, created by the prior

judgments * * *, could not be destroyed by subsequent legislation," the landlords claimed that the new law violated the Due Process Clause. 331 U.S. at 102. This Court rejected the claim that "vested rights" in "valid judgments" were immune from regulation:

> So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it. Immunity from federal regulation is not gained through forehanded contracts. * * * The rights acquired by judgments have no different standing.

Id. at 107. See also *Federal Housing Admin.* v. *Darlington*, 358 U.S. 84, 91 n.6 (1958) (*Fleming* holds that "any 'vested' rights by reason of the state judgment were acquired subject to the possibility of their dilution through Congress' exercise of its paramount regulatory power").

If rights "vested" in a judgment were made inviolate by the Due Process Clause, Fed. R. Civ. P. 60(b) would be constitutionally suspect. Rule 60(b) sets forth a variety of grounds that justify reopening of otherwise final judgments, and some courts have exercised the reopening power in light of changes in the law. See *Adams* v. *Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989); *Matarese* v. *LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986), cert. denied, 480 U.S. 908 (1987). This Court as well has reopened a final judgment, when a change in legal terrain rendered the prior judgment inequitable. See *Gondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (per curiam) (granting second petition for rehearing, filed four Terms after certiorari had been denied, because of a change in decisional law governing eligibility for compensation, and because other victims of the same accident had won compensation awards in other courts). If the Due Process Clause permits those interferences with "vested rights" in a judgment, it also permits reopenings under standards enacted by Congress.

2. Under the due process standards that govern review of economic legislation, Section 27A(b) is constitutional. Section 27A is designed to protect the reliance interests of plaintiffs who filed suit before this Court's decision in *Lampf* and whose actions were timely under the limitations periods in effect in their jurisdictions. Congress acted to prevent the perceived unfairness that would result if the change in the limitations period brought about by *Lampf* were applied "to those cases that were pending at the time that the decision came down." 137 Cong. Rec. S18,623-S18,624 (daily ed. Nov. 27, 1991) (Sen. Bryan). Congress was also concerned about the adverse impact of *Lampf* and *Beam* upon private enforcement of the securities laws.[23] Congress had particular reason to protect those plaintiffs whose suits were rendered untimely by *Lampf* and whose judgments became final only because they refrained from taking appeals that the court of appeals indicated would be "meritless" and "sanctionable." Pet. App. 5a. Those legislative goals are plainly legiti-

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[23] See *Securities Investor Protection Act of 1991: Hearings on S. 1533 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 102d Cong., 1st Sess. 2 (1991) (Sen. Bryan); *id.* at 15-16 (Richard C. Breeden, Chairman, SEC); *Securities Investors' Legal Rights: Hearings on H.R. 3185 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 38-39 (1991) (Rep. Markey and Chairman Breeden); *id.* at 21-24 (Chairman Breeden).

mate ones, and Section 27A(b) is directly tailored to advance them.

At the same time, given the circumstances surrounding the enactment of Section 27A(b), the defendants in those cases cannot plausibly claim that the statute prejudices any legitimate reliance interests on their part. Before this Court's decision in *Lampf*, the law of the Sixth Circuit, where this suit arose, made clear that claims under Section 10(b) of the Exchange Act were governed by state limitations periods. *See, e.g., Carothers* v. *Rice*, 633 F.2d 7, 8-9 (6th Cir. 1980), cert. denied, 450 U.S. 998 (1981). Far from disrupting settled expectations concerning the applicable limitations period, Section 27A gives effect to those expectations. When the Court retroactively mandated the application of a "1-and-3" rule in *Lampf* and *Beam*, Congress moved quickly to restore the pre-*Lampf* rule, enacting Section 27A in less than six months and requiring motions for reinstatement to be filed within 60 days. See *United States* v. *Carlton*, *supra*, slip op. 6 ("Congress acted promptly and established only a modest period of retroactivity."). In this case, for example, only a few months passed between the district court's dismissal of the Section 10(b) claims and the enactment of Section 27A. In those circumstances, any potential "reliance" interests created by the dismissal order are insufficient "to establish a constitutional violation." *Carlton*, *supra*, slip op. 7; *Usery*, 428 U.S. at 16.[24]

[24] Respondents did not invoke the Takings Clause of the Fifth Amendment below, nor was that issue addressed by the court of appeals. As a result, the issue is not properly before this Court. See *Granfinanciera* v. *Nordberg*, 492 U.S. 33, 38-39 (1989). In any event, Section 27A(b) does not "take" any compensable property interest. All that has been "taken" by Section 27A(b) is the "right" fortuitously bestowed on some defendants by *Lampf* and *Beam* not to litigate federal securities claims. The financial burden of litigation is hardly the kind of deprivation that entitles litigants to compensation under the Fifth Amendment. Cf. *United States* v. *Bodcaw Co.*, 440 U.S. 202, 203 (1979) (per curiam) (litigation expenses are not just compensation); *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.").

The Takings Clause would not entitle defendants to compensation by the federal government even if they are found to have violated the federal securities laws and are ultimately required to pay damages. In that event, the damages would be due to fraudulent acts that were illegal when committed and that gave rise to liability under already-existing federal laws. Reimposing liability to injured persons for actions that were tortious and unlawful when taken can hardly constitute a "taking" of "property" within the meaning of the Takings Clause. The object of that provision is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Dolan* v. *Tigard*, No. 93-518 (June 24, 1994), slip op. 9. There is "no constitutionally compelled reason to require the Treasury to assume the financial burden," *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 228 (1986), for the fraud, if any, committed by private defendants.

B. The "Vested Rights" Doctrine, Even If It Has Continuing Significance, Does Not Invalidate Section 27A(b)

As demonstrated above, the Due Process Clause does not create a special category of "vested rights" in judgments that are exempt from congressional regulation. This case provides no justification for recognizing such a doctrine, and even under older precedents of this Court, the "vested rights" claim fails.

1. The claim that "vested rights" in a judgment deserve absolute constitutional protection is at its weakest with respect to the judgment at issue here: a judgment resting on the statute of limitations, rather than an adjudication of the merits of the underlying dispute. Such a judgment does not create or declare any property right in the defendant; it merely protects the defendant from a particular suit.

When a case is dismissed solely because it is time-barred under then-governing law, the dismissal does not necessarily extinguish the underlying claim, which may continue to be asserted. Cf. *Block* v. *North Dakota*, 461 U.S. 273, 291 (1983) (final dismissal of claimant's quiet title action against the United States on the ground that the limitations period had expired would not divest the claimant of whatever property rights it possesses, which may be asserted in another proceeding); *Bank of the United States* v. *Donnally*, 33 U.S. (8 Pet.) 361, 370 (1834) ("As the contract, upon which the original suit was brought was made in Kentucky, and is sought to be enforced in the state of Virginia, the decision of the case in favor of the defendant, upon the plea of the statute of limitations, will operate as a bar to a subsequent suit in the same state; but not necessarily as an extinguishment of the contract elsewhere, and especially in Kentucky."). And revival of the cause of action underlying the judgment of dismissal does not impose liability retroactively on a transaction that was lawful at the time. See *Graham & Foster* v. *Goodcell*, 282 U.S. 409, 429 (1931) (rejecting "vested rights" challenge to curative statute restoring tax liability after statute of limitations had run). Section 27A(b) does not change the rules that prohibited respondents from committing fraud in securities transactions; it merely permits application of those rules notwithstanding the prior judgment, which was entered without reaching the merits. Section 27A(b) therefore does not deprive the defendant of any property interest.

As a general matter, the Due Process Clause does not prohibit legislatures from retroactively reviving claims that have become barred by the running of a statute of limitations. *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945); *International Union of Electrical Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 243-244 (1976); *Campbell* v. *Holt*, 115 U.S. at 628. A judgment that confirmed the running of the former limitation period does not add much to a defendant's due process objection to subsequent legislation that removes the time-bar to suit.

2. Even if this case were analyzed under older precedents that suggest that there is special protection accorded to some interests in a judgment, Section 27A(b) passes constitutional muster. As the court of appeals noted, Pet. App. 14a n.12, this Court stated in *McCullough* v. *Virginia*, 172 U.S. 102, 123 (1898), that "[i]t is not within the power of a legislature to take away rights which have been once vested by a judgment." *McCullough*'s application of its "rule" protecting vested rights in a judgment, however, is inconsistent with this Court's decisions, both before and since. The judgment at issue in *McCullough* was that of a trial court; the case was pending on appeal when the state legislature changed the relevant law. Despite the quoted statement in *McCullough*, it is well established that a change in law may be applied to a pending case when the legis-

lature has so indicated with the requisite degree of clarity.[25]

Moreover, this Court has never foreclosed legislative action affecting even a final judgment in the unqualified fashion suggested by *McCullough*. To the contrary, the Court has upheld a wide range of federal and state statutes that have divested litigants of the benefits of final judgments. See, *e.g.*, *Fleming* v. *Rhodes*, *supra*; *Paramino Lumber Co.* v. *Marshall*, 309 U.S. 370 (1940); *Hodges* v. *Snyder*, 261 U.S. 600, 603-604 (1923); *Stephens* v. *Cherokee Nation*,

[25] In *McCullough*, the Court reviewed a Virginia law that rescinded the right of a bondholder to use coupons to pay state taxes, and instead required taxes to be paid in cash. 172 U.S. at 103-105, 122. The bulk of the Court's opinion sustained the bondholder's claim that the right to use the coupons was protected from state impairment by the Contract Clause of the Constitution, Art. I, § 10, Cl. 1. 172 U.S. at 109-123. The language regarding "rights which have once been vested by a judgment" appears in a section of the opinion that rejected the claim that the bondholder's action had to be dismissed because after the judgment was rendered in the trial court, and the case was on appeal, Virginia repealed the "statute authorizing this particular form of suit." *Id.* at 123. *McCullough*'s statement that the legislature cannot repeal the right to sue while a case is pending on appeal from a judgment conflicts with cases dating from *The Schooner Peggy*, 5 U.S. (1 Cranch) at 110 ("the court must decide [a case] according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside"), to *Landgraf* v. *USI Film Products*, 114 S. Ct. at 1501 ("in many situations, a court should apply the law in effect at the time it renders its decision, * * * even though that law was enacted after the events that gave rise to the suit"). The result in *McCullough* can be explained, however, as protecting the bondholder's right to enforce a contract with the State against state impairment in the form of the withdrawal of a remedy.

174 U.S. 445, 477-478 (1899); *Freeland* v. *Williams*, 131 U.S. 405, 417-421 (1889); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855). In particular, this Court has held that the concept of vested rights does not invalidate legislation, like Section 27A(b), that directs the reopening and reexamination of final judgments, even when the legislation is enacted after the judgments have become final and the reexamination requires the application of new rules of law.

In *Freeland*, for example, a land owner obtained a money judgment against a soldier who stole cattle during the Civil War. 131 U.S. at 406. In 1867, the Supreme Court of West Virginia affirmed the judgment, which rejected a defense based on the soldier's status as a belligerent. *Id.* at 407-408. In 1872, before the land owner had executed the judgment, West Virginia amended its constitution to provide that no person "shall be liable in any proceeding, * * * nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered," for military actions that were consistent with "the usages of civilized warfare" during the Civil War. *Id.* at 411.

Invoking the new law, the defendant in *Freeland* brought a bill to enjoin execution of the plaintiff's final judgment. 131 U.S. at 407-409. The plaintiff challenged the constitutionality of the law, raising a "vested right" argument:

> The proposition of the plaintiff * * * is, that by the judgment of the [trial court] he had acquired a vested right in that judgment; that the judgment was his property; and that any act of the State which prevents his enforcing that judgment * * * is depriving him of property without due process of law * * *. This right of the plain-

> tiff to enforce that judgment is insisted upon as a vested right with which no authority can lawfully interfere.

Id. at 417. This Court rejected the vested right claim and sustained West Virginia's power to bar enforcement of the final judgment. *Id.* at 417-421. The Court explained that "[j]udgments, however solemn, however high the court which rendered them, and however conclusive in a general way between the parties," may constitutionally be "subject[ed] to review, to reconsideration, to reversal and to modification by various modes," such as writs of error and bills of review. *Id.* at 418. The Court further held that the legislature could retroactively "remov[e] objections and obstructions" to such review procedures, even when the "objections and obstructions" consisted of the substantive legal rules that supported the original judgment. *Id.* at 419-420.

In concluding that due process of law allowed the expansion of opportunities to review a judgment, even after the judgment became final, the Court stated in Freeland that "[p]rior to the adoption of the 14th Amendment the power to provide such remedies, although they may have interfered with what were called vested rights, seems to have been fully conceded." 131 U.S. at 420 (citing *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386 (1798); *Satterlee* v. *Matthewson*, 27 U.S. (2 Pet.) 380 (1829); *Sampeyreac* v. *United States*, 32 U.S. (7 Pet.) 222 (1833); *Watson* v. *Mercer*, 33 U.S. (8 Pet.) 88 (1834); and *Freeborn* v. *Smith*, 69 U.S. (2 Wall.) 160 (1864)). *Freeland* concluded that the adoption of the Fourteenth Amendment did not cast doubt on the validity of statutes of that character. 131 U.S. at 420.

In *Stephens*, individuals obtained decrees of Indian citizenship from the United States Court for the Indian Territory in what is now Oklahoma. 174 U.S. at 476. The statute under which the suits were brought provided that "the judgment of the court shall be final." *Ibid.* After the judgments were entered, Congress enacted legislation permitting the losing parties to reopen the judgments by appealing them to this Court. *Id.* at 476-477. The individuals who had prevailed in the trial court attacked the retroactive legislation on the ground, *inter alia*, that it was "destructive of vested rights." *Id.* at 477. Citing *Freeland*, this Court summarily rejected that contention, stating that "the grant of a new remedy by way of review has been often sustained under particular circumstances." *Id.* at 478. The court dismissed the vested rights claim as inapposite where "the right asserted to be vested is only the exemption of the[] judgments from review." *Ibid.*

The Court applied the same principles again in *Paramino*. There, a federal agency issued an administrative judgment affording only limited compensation to a longshoreman under the Longshoremen's and Harbor Workers' Compensation Act. 309 U.S. at 374-375. The longshoreman did not seek review of the judgment, which by statute became final after 30 days. *Id.* at 375. Five years later, Congress enacted a private bill "ordering the Compensation Commission to review [the] case and to issue a new order, the provisions in the Compensation Act limiting time for reviewing awards 'to the contrary notwithstanding.'" *Ibid.* The defendant employer argued that the legislation violated the Due Process Clause. 309 U.S. at 377. Relying on *McCullough*, the defendant contended that "[t]he compensation award was a final adjudication vesting property rights" that were "not alterable by subsequent legislation." *Id.* at 372. This Court rejected the invocation of *McCul-*

lough, reasoning that "the immunity obtained by the lapse of the time for review is [not] the type of immunity which protects its beneficiary from retroactive legislation authorizing review of the claim." *Id.* at 378.

Section 27A(b) plays precisely the same role as the legislation upheld in *Freeland*, *Stephens*, and *Paramino*. In this case and others governed by Section 27A(b), the losing party failed to seek review of an adverse judgment within a statutory time limit imposed by the legislature, and the judgment became final as a result. Congress thereafter enacted legislation providing for further review by the courts, notwithstanding the finality of the original judgment, and it provided for the courts to apply a new rule of law on the limitations issue when doing so. This Court's decisions confirm the constitutionality of Section 27A(b) in each of those respects. They show that no doctrine of vested rights forecloses the legislature from directing review after the statutory time for review has already run and the judgment has become final (*Paramino*), or from retroactively creating a review procedure that did not previously exist (*Stephens*). And they show that the legislature may direct tribunals to reexamine their judgments not only to determine their correctness under the law that existed at the time the judgment was entered, but also to take account of subsequent, retroactive changes in the substantive rules of law (*Freeland*). It is true that *Freeland*, *Stephens*, and *Paramino* did not involve Article III tribunals, but neither did *McCullough* itself, the case said to establish the vested rights doctrine. If vested rights in judgments exist, there is no reason to find that only federal courts can create them.

In sum, Section 27A(b) does nothing that this Court has not already sustained in *Freeland*, *Stephens*, and *Paramino*. Because Section 27A(b) is indistinguishable for due process purposes from the statutes upheld in those cases, the provision meets the requirements of the Due Process Clause regardless of whether this Court treats the vested rights doctrine as a constitutional anachronism or, instead, as an aspect of current due process analysis.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Section 27A of the Securities Exchange Act of 1934, 15 U.S.C. 78aa-1 (Supp. IV 1992), provides:

> (a) *Effect on Pending Causes of Action.*—The limitation period for any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) *Effect on Dismissed Causes of Action.*—Any private civil action implied under Section 10(b) of this Act that was commenced on or before June 19, 1991—
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,
>
> shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

(6)

No. 93-1121

In The

Supreme Court of the United States

October Term, 1994

ED PLAUT, ET AL.,

Petitioners,

v.

SPENDTHRIFT FARM, INC., ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF and BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS ("NASCAT") IN SUPPORT OF PETITIONERS

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MOTION OF NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS ("NASCAT") FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.4 of the Supreme Court Rules, the National Association of Securities and Commercial Law Attorneys ("NASCAT") hereby moves for leave to file an *amicus curiae* brief in this case on behalf of petitioners.

Petitioners and respondents Francis M. Wheat, Gibson, Dunn & Crutcher, Deloitte & Touche (formerly Deloitte Haskins & Sells), and Spendthrift Farm, Inc. have given NASCAT written consent to file an *amicus curiae* brief in this case on behalf of petitioners. NASCAT has requested consent from respondents Norman Owens, American International Bloodstock, and Kemper Securities (formerly Bateman, Eichler), but those respondents have refused to consent.

As discussed in greater length in the Statement of Interest, NASCAT is an association of attorneys located throughout the United States whose members represent many thousands of plaintiffs with billions of dollars of claims for securities fraud, whose claims, although timely when filed, were placed in jeopardy by retroactive application of the new statute of limitations for Section 10(b) claims announced in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773 (1991). The legislation at issue in this case, Section 27A of the Securities Exchange Act, was enacted, among other reasons, to alleviate unfairness to persons such as those represented by NASCAT members.

The brief NASCAT seeks to file offers a broad perspective regarding the importance of this legislation and its impact on thousands of persons. NASCAT's brief addresses the policy and legal implications of a decision in this case on persons not parties to this action.

NASCAT has a continuing interest in the issue before this Court in this case. NASCAT members have briefed and argued this issue in the Circuit Courts of Appeals, and NASCAT filed an *amicus curiae* brief on this issue in this Court in *Morgan Stanley & Co., et al. v. Pacific Mutual Life Ins. Co.*, No. 93-609.

Dated: San Francisco, California
July 19, 1994

Respectfully submitted,

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STATEMENT OF INTEREST

NASCAT is an association of law firms consisting of attorneys located throughout the United States. NASCAT and its members advocate the enactment and enforcement of effective laws to protect investors from deceptive and manipulative practices and to ensure that the United States' securities markets operate freely and efficiently. NASCAT's members frequently represent plaintiffs in a variety of individual and class action cases prosecuted under the federal securities laws.[1]

NASCAT and its members have a strong interest in the effective private enforcement of the federal securities laws and in the development of case law that effectively deters wrongdoers from perpetrating securities fraud upon investors in this country.

Specifically with respect to NASCAT's interest in the constitutionality of Section 27A of the Securities Exchange Act, NASCAT's members represent many thousands of plaintiffs with billions of dollars of claims for securities fraud, whose claims, although timely when filed, were placed in jeopardy by retroactive application of the new statute of limitations for Section 10(b) claims announced in this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773 (1991). Congress' enactment of Section 27A, 15 U.S.C. § 78aa-1 (Supp. III 1991), was designed to alleviate the unfairness to those plaintiffs – who had properly relied on the statutes of limitations in place when they

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[1] NASCAT members also have represented defendants in securities litigation and in other complex cases.

filed their claims – caused by the retroactive application of the new *Lampf* rule and to prevent a windfall to culpable parties who defrauded those plaintiffs.

SUMMARY OF ARGUMENT

This Court's statutory interpretation of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a, *et seq.*, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S. Ct. 2773 (1991), announcing a uniform federal limitations period for claims brought under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), changed decades of well-established law in most circuits. This Court's holding in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S. Ct. 2439 (1991), that a new rule of statutory interpretation applied to the litigants before this Court must be applied to all pending cases, led to retroactive application of the new *Lampf* rule. That retroactive application caused widespread unfairness and serious injustice.

Hundreds of thousands of victims of securities fraud who had previously filed legitimate claims in proper reliance on the then-existing statutes of limitations were placed in jeopardy of losing their claims, whose aggregate value exceeded four and one-half billion dollars. Many culpable persons who had defrauded those victims were given the unexpected opportunity to be relieved of well-deserved liability. After consulting with constituents and conducting hearings, Congress enacted legislation, an amendment to the Securities Exchange Act, relieving the unfairness and correcting the injustice by restoring

the status quo prior to the *Lampf* decision for cases pending the day the *Lampf* decision was decided.

Respondents do not dispute that the legislation Congress enacted, Section 27A, is constitutional with respect to cases that were still pending in the judicial system as of the date of enactment of the legislation.[2] Respondents contend, however, that Congress is without power to relieve the unfairness and prevent the injustice with respect to cases where a "final,"[3] no-longer-appealable judgment was entered between the date of the *Lampf* decision in June, 1991, and the date of the enactment of Section 27A in December, 1991.

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[2] *See Plaut v. Spendthrift Farm*, 1 F.3d 1487, 1490 n.5 (6th Cir. 1993) *cert. granted in part*, 114 S.Ct. 2161 (1994). The seven circuit courts that have reviewed that issue have unanimously held that Section 27A is constitutional with respect to cases that were pending in the judicial system as of the date of the enactment of the legislation. *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1569 (9th Cir. 1993); *Anixter v. Home-Stake Prod. Co.*, 977 F.2d 1533, 1547 (10th Cir.), *reh'g granted in part*, 977 F.2d 1549 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1841, 123 L. Ed. 2d 467 (1993); *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1575 (11th Cir. 1992); *Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256 (4th Cir. 1993); *Cooperativa de Ahorro y Credito Aguada v. Kidder Peabody & Co.*, 993 F.2d 269, 273 & n.11 (1st Cir. 1993); *Berning v. A.G. Edwards & Sons, Inc.*, 990 F.2d 272, 278-79 (7th Cir. 1993); *Axel Johnson, Inc. v. Arthur-Andersen & Co.*, 6 F.3d 78 (2d Cir. 1993).

[3] A judicial decision is only "final" in this sense if judgment "has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). Cases in which judgments are not "final" are "pending."

The rule respondents propose – that Congress may not constitutionally enact legislation assisting unfairly disadvantaged persons because they had the misfortune to have district judges who ruled promptly and because they correctly believed that filing an appeal would have been pointless under then existing law – would be unfair and counterproductive. Such a rule ignores the reality that it takes Congress some time, more than the length of an appeal period, to enact legislation providing transitional rules for new judicial announcements. Such a rule also would create the wrong incentives, since it would encourage people to file frivolous appeals. Most important, such an intrusion on Congressional authority is not grounded in the Constitution or the decisions of this Court.

Contrary to respondents' contentions, final judgments are not sacrosanct. This Court has expressly upheld as constitutional federal and state statutes that have divested litigants of final judgments. *See, e.g., Fleming v. Rhodes*, 331 U.S. 100, 107 (1947); *Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 374 (1940); *Stephens v. Cherokee Nation*, 174 U.S. 445, 477-78 (1899); *Freeland v. Williams*, 131 U.S. 405, 417-21 (1889); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1856).

Separation-of-powers principles are not violated when, as here, Congress is performing legislative functions, not judicial functions. When amending the Securities Exchange Act to add Section 27A(b), Congress was not sitting as a court of errors or directing the outcome of a particular case. Instead, Congress was performing a traditional legislative function by revising the nation's statutory law. Section 27A(b)'s enactment was a proper

exercise of Congress' legislative power under Article I of the Constitution.

Respondents' due process argument also fails. The transitory windfall respondents and other similarly situated defendants received as a result of the retroactive application of the *Lampf* rule did not create "fundamental rights." Accordingly, Congress had the right to enact legislation affecting those interests, so long as the legislation enacted was rationally related to a legitimate goal. Section 27A(b) easily passes that test; the legislation was not only rational, but a fair and just legislative solution to a compelling need.

Invalidating Section 27A(b) would prevent Congress from helping persons with legitimate claims who lost those claims through no fault of their own. Even more important, striking down this Act of Congress when there is no sound constitutional basis for so doing would improperly shift the balance of powers in our system of government away from Congress, leaving no branch of government with the authority to provide for the transitional rules needed to temper the inequities that may be caused by retroactive application of a new judicial rule.

Accordingly, this Court should reverse the Sixth Circuit, and uphold Section 27A(b) as constitutional.

ARGUMENT

I. SECTION 27A(b) DOES NOT VIOLATE THE SEPARATION-OF-POWERS DOCTRINE.

A. Section 27A(b) Was A Proper, And Indeed Essential, Exercise Of Congress' Authority Under Article I.

Article I of the United States Constitution vests all legislative powers in Congress. U.S. Const., art. I, § 1. That power includes the power to alter statutes of limitation, which this Court described in *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 408 (1982), as rules " 'good only by legislative grace . . . subject to a relatively large degree of legislative control'" (quoting *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945)).

Pursuant to its power to regulate interstate commerce, U.S. Const., art. I, § 8, Congress enacted the Securities Exchange Act. Acting within its constitutional legislative authority, Congress amended the Securities Exchange Act, by enacting Section 27A, to create statutes of limitation for Section 10(b) claims pending on June 19, 1991.

1. Section 27A(b) Modified The Nation's Statutory Law To Relieve Unfairness To Victims Who Properly Relied On Existing Statutes Of Limitation And To Prevent An Unjust Windfall To Culpable Parties.

Retroactive application of the new statute of limitation announced in *Lampf* had a devastating impact nationwide. Over four and one-half *billion* dollars worth of claims that had been timely when filed were dismissed

pursuant to retroactive application of the new *Lampf* rule. *See Securities Investors Legal Rights: Hearing On H.R. 3185 Before the Telecommunications and Finance Subcomm. of the House Comm. on Energy and Commerce*, 102nd Cong., 1st Sess. 3-6 (Nov. 21, 1991) (estimating $4.578 billion worth of claims dismissed). As Senator Bryan emphasized when legislation addressing *Lampf* retroactively was introduced in the Senate, "*Lampf* changed the rules in the middle of the game for thousands of fraud victims who already had suits pending." 137 Cong. Rec. S18624 (daily ed. Nov. 27, 1991) (Sen. Bryan). Retroactive application of the new *Lampf* rule to all Section 10(b) claims pending when *Lampf* was decided would have resulted in the dismissal of the valid claims of thousands against many serious wrongdoers, including Michael Milken and Charles Keating. *See* 137 Cong. Rec. S17356 (daily ed. Nov. 21, 1991) (Sen. Domenici); *see also Securities Investor Protection Act of 1991: Hearing on S.1533 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 102nd Cong., 1st Sess. 1-2 (Oct. 2, 1991). Hundreds of thousands of plaintiffs were placed in jeopardy of forfeiting legitimate claims through no fault of their own.

Thousands of these investors lost their life savings as the proximate result of unscrupulous conduct. *See, e.g., In re American Continental Corp./Lincoln Savings and Loan Securities Litigation*, 140 F.R.D. 425 (D. Ariz. 1992) (describing conduct of the defendants in the *Lincoln Savings* case). The securities laws gave these individuals an opportunity for redress. Retroactive application of the *Lampf* decision took that opportunity away. Congress enacted Section 27A to restore that opportunity, to prevent manifest unfairness, and to correct injustice.

2. *Beam* Makes Clear That Congress Must Have The Authority To Enact Transitional Rules Required By New Judicial Statutory Interpretations.

In *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), this Court held that Courts must apply the law as they find it to pending cases. After *Beam*, Courts no longer have the discretion to provide transitional rules for new judicial interpretations of statutes applied in regular judicial course to the litigants before the Court. Courts are obliged to apply such new interpretations to all pending cases, regardless of whether that causes inequities.

New judicial rules may well cause inequitable results when applied retroactively. *See generally Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *Lampf, Pleva*, 111 S. Ct. at 2785-88 (1991) (O'Connor, J., dissenting). Under the Constitution, the Executive does not have the authority to address these inequities. After *Beam*, courts do not either.

Congress, the branch of the Government vested with legislative power, is the proper – and, after *Beam*, perhaps only[4] – source of such transitional rules. U.S. Const., art. I. Congress is well-suited to make the policy decisions necessary to provide for the transition between judicial rules. It has investigatory, policy making, and line drawing abilities that the judicial branch lacks. Analyzing the policy implications of new judicial rules and enacting

[4] In *Beam*, this Court did not render a decision regarding "the bounds or propriety of pure prospectivity." 111 S. Ct. at 2448 (Souter, J.).

legislation that provides for the unanticipated impact of such rules is a normal and appropriate legislative function.[5]

The same reasons that made this Court conclude in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), that on some occasions retrospective application of a new rule is not appropriate, establish the need for some government body to have the authority to decide that new rules will not always have full retroactive application. If the judiciary is without authority to deviate from a rule of complete retroactivity, fairness and effective operation of government demand that the authority to temper such a rule be vested elsewhere in government. *See generally General Motors Corp. v. Romein*, 112 S. Ct. 1105 (1992).

Accordingly, Section 27A's enactment in response to the new judicial interpretation announced in *Lampf* was not only proper, but essential. If, as respondents propose, Congress is deprived of the ability to enact transitional rules, and if, after *Beam*, courts cannot provide them, inequities caused by new judicial rules will be not only inevitable, but also irremediable. No branch of government will have the authority to enact tempering transitional rules.

[5] For example, when this Court, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), Congress saved municipalities from paying huge amounts in back overtime due under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.* by amending the FLSA to provide that municipalities were exempt from compliance under the FLSA until after the date of the amendment. Act of Nov. 13, 1985, Pub. L. No. 99-150, 99 Stat. 787.

Respondents might contend that Section 27A is constitutional in large part, and that Congress may enact transitional rules for all cases except those where final judgments are entered. But such an argument would ignore the nature of the legislative process. Congress must collect information and reach consensus before it acts. Accordingly, it rarely acts quickly. Indeed, the enactment of Section 27A in response to *Lampf* was relatively speedy. Unless courts stay all proceedings between the time a new judicial rule of statutory interpretation is announced and the time Congress acts in response – an impossibility both because the court system would grind to a halt and because there is no way of knowing whether Congress will choose to act in response – or unless the rule respondents propose causes all parties always to file appeals, regardless of whether they are meritorious, in the hope that the law will change – an undesirable result – some final judgments will always be entered. Preventing Congress from enacting transitional rules applicable to the cases where those judgments are entered would prevent Congress from performing a necessary constitutional function that only it is authorized to perform.

B. Section 27A(b) Does Not Violate The Principle In *Hayburn's Case* Or Other Separation-Of-Powers Principles.

Respondents emphasize the importance of "final judgments" to the independence of the judiciary. But "final judgments" are not sacrosanct. This Court has expressly upheld legislation reopening final judgments: *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980);

Fleming v. Rhodes, 331 U.S. 100, 107 (1947); *Paramino Lumber Co. v. Marshall*, 309 U.S. 370, 374 (1940); *Stephens v. Cherokee Nation*, 174 U.S. 445, 477-78 (1899); *Freeland v. Williams*, 131 U.S. 405, 417-21 (1889); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1856).

Nothing in the Constitution forbids Congress from affecting final judgments by changing the applicable law, provided that Congress does not usurp adjudicative functions by "sit[ting] as a court of errors" to review those judgments. *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792).[6]

When enacting Section 27A, Congress was not passing on the correctness of judicial decisions under existing law. Instead, Congress was properly exercising its legislative authority under Article I to modify this nation's statutory law.

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[6] The rule respondents propose – distinguishing between those cases which happened to be pending because the particular district court judge was slow to apply *Lampf* retroactively or because the attorneys for the plaintiffs chose, for whatever reasons, to file an appeal – would place form over substance. If Section 27A does not offend separation-of-powers principles as to "pending cases" since it is "legislation," not "adjudication," as seven circuits have unanimously held and respondents do not dispute, *see* n.2, *supra*, it is hard to fathom how that same legislation is adjudication when addressed toward cases where no appeal was filed.

This rule based on form, not substance, would be arbitrary and unfair. It would also create the wrong incentives, since it would encourage frivolous appeals, and penalize the ethical together with the informed.

The legislation enacting Section 27A expressly provided that "[t]he Securities Exchange Act of 1934 is amended." F.D.I.C. Improvement Act of 1991, Pub. L. No. 102-232, § 476, 105 Stat. 2387. Section 27A modifies that Act by expressly providing a limitation period for certain claims. Whereas on June 19, 1991, *i.e.*, the day before this Court issued the *Lampf* decision, the Securities Exchange Act was silent on the issue of the limitation period for Section 10(b) claims, and whereas from June 20, 1991 through December 19, 1991, the judicially created *Lampf* rule governed, the Securities Exchange Act now specifies limitation periods for claims pending on June 19, 1991. Section 27A thus simply amended existing law, a traditional legislative function. *See Robertson v. Seattle Audubon Soc'y*, 112 S. Ct. 1407 (1992).

Section 27A(b) does not have the attributes of adjudication; it has attributes of legislation. Section 27A(b) does not direct any court to reach a particular outcome. Section 27A(b) leaves the task of fact finding and application of the law to facts to the judiciary. Congress has simply changed the law to which the facts must be applied. At most, Section 27A(b) makes unavailable to respondents a specific procedural device, without directing the outcome of the action. This Court upheld the constitutionality of similar legislation against a separation-of-powers attack in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980). In *Sioux Nation*, Congress enacted legislation withdrawing a *res judicata* defense in a case involving an Indian treaty. This Court rejected an argument that the legislation was unconstitutional under the separation-of-powers principles, ruling that "Congress made no effort . . . to control the Court of Claims' ultimate decision of

that claim. . . ."[7] Similarly, in the case of Section 27A(b), the ultimate decision on the relevant claims will be made by the courts, not by Congress.

Respondents may argue that even if one were to concede that "new law" may be interposed to reopen final judgments, Section 27A(b) is not "legislative" in any meaningful sense since it has no prospective effect.[8] The

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[7] Respondents may attempt to distinguish *Sioux Nation* by asserting that the *Sioux Nation* decision simply involved a decision by the United States to waive the defense of *res judicata*. That attempted distinction is not persuasive, however, in the context of the separation-of-powers issue. Because the separation-of-powers doctrine protects the integrity of the constitutional structure, a violation of the separation-of-powers doctrine cannot be waived by the parties to the litigation. Because legislation invalid under the separation-of-powers doctrine cannot be validated by waiver of the parties, the fact that the United States was a party to the *Sioux Nation* litigation was irrelevant to the court's conclusion that the legislation survived separation-of-powers analysis. At the very minimum, this Court's statement in *Sioux Nation* that "Congress made no effort . . . to control the Court of Claims' ultimate decision of that claim," *Sioux Nation*, 488 U.S. at 405, must be viewed as an alternative holding on the separation-of-powers issue.

[8] Interestingly, at the oral argument before this Court in *Morgan Stanley & Co., Inc., et al. v. Pacific Mutual Life Ins. Co., et al.*, No. 93-609 (April 26, 1994), counsel for Morgan Stanley took the position that even if Congress passes legislation enacting a longer statute of limitations (and makes it express that the longer statute applies both prospectively and retroactively), the legislation could not constitutionally reopen final judgments rendered under the shorter limitations period. (Oral Argument Tr. at 15-17.) Such an extreme rule would inevitably – given the length of time it realistically takes Congress to enact legislation – transfer determination of the appropriate length of a statute of limitation in large groups of cases from the legislature to the

argument that Section 27A is not "legislative" because it has no prospective effect has been soundly rejected by the Circuit Courts that have addressed that issue.[9]

Respondents can cite no appellate case that has invalidated an act of Congress on separation-of-powers grounds because the legislation at issue affected pending cases without having a prospective effect. Indeed, the most recent opinion of this Court touching on separation-

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courts, a result that not only is not compelled by separation of powers principles, but is at odds with those principles. Such a rule would also limit Congress' ability to enact comprehensive prospective and retroactive legislation concerning any number of economic and social issues, regardless of whether Congress specified that it intended the legislation to be both prospective and retroactive, and regardless of whether the retroactive aspects of the legislation are rationally related to a legitimate government interest. *Cf. Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) (retroactive legislation constitutional if rationally related to legitimate government interest); *United States v. Carlton*, 62 U.S.L.W. 4472 (1994) (same); *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994) (for legislation to apply retroactively, Congress must so state expressly).

[9] *See, e.g., Henderson v. Scientific-Atlanta*, 971 F.2d at 1573:

> *Scientific* attempts to distinguish *Audubon* on the ground that the Compromise in that case had both retroactive and prospective effect whereas Section 27A has only a retroactive effect. *See* Appellee's Supplemental Brief at 7-8. We fail to see the significance of such a distinction. The central issue is whether Section 27A violates separation of powers principles by interfering with judicial decision-making. The presence of an additional prospective effect in no way lessens such interference if it exists at all. Accordingly, we conclude that *Audubon* is controlling in this case.

See also Gray v. First Winthrop, 989 F.2d at 1570.

of-powers issues, *Robertson v. Seattle Audubon Society*, upheld legislation that had extremely narrow prospective effect and admittedly was enacted "in response to . . . ongoing litigation." 112 S. Ct. at 1410. The legislation at issue in *Robertson v. Seattle Audubon Society* was manifestly directed at specific pending cases, and even identified those cases by docket number and caption. *See* 112 S. Ct. at 1411. Although the legislation at issue theoretically had certain prospective effect, it was limited in geography to the site of the pending cases, and by its terms would expire within a few months of its passage. *Id.* at 1410-11. To say that the limited theoretical prospective effect of that legislation is what made that legislation constitutional, is to elevate form over substance.

Moreover, in *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) this Court upheld legislation with no prospective effect. The enactment at issue in *Sioux Nation* operated solely on one pending lawsuit. It provided that the court of claims would review the merits of the *Sioux Nation*'s claims, without regard to the defense of *res judicata* or collateral estoppel. The legislation had no prospective effect, yet this Court upheld the statute against a separation-of-powers challenge.[10]

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[10] To be sure, retroactive legislation must survive constitutional scrutiny, but that scrutiny is the rational basis review applied under the due process clause, *see Pension Benefit Guaranty Corp v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984); *United States v. Carlton*, 62 U.S.L.W. 4255 (1994), which Section 27A(b) easily passes, *see* Section II.C., *infra*.

As the Fifth Circuit noted in *Pacific Mutual Life Insurance Co. v. First Republicbank Corp.*, 997 F.2d 39, 45 (5th Cir. 1993), *aff'd by equally divided ct.*, 114 S. Ct. 1827 (1994), "While the Constitution

Section 27A(b) was legislation that modified existing statutory law to provide a transitional rule for a new judicial rule. Its enactment was not an instance of Congress "sit[ting] as a court of errors" overturning decisions it did not like without changing the underlying law.[11] *Cf Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410 (1792). Because Section 27A(b) involves legislation, not adjudication, it does not violate separation-of-powers principles.[12]

II. SECTION 27A(b) DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

A. The Windfall Respondents And Others Received From *Lampf*'s Retroactive Application Did Not Create A "Fundamental" Right.

Congress has the power to adopt new statutes of limitations that apply retroactively as well as prospectively. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945); *Campbell v. Holt*, 115 U.S. 620 (1885). The fact that legislation revives claims that were previously adjudicated by a trial court to be time barred in no way undermines the constitutionality of the legislation. In *Chase*

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proscribes retroactive criminal legislation, it contains no analogous civil provision. U.S. Const. art. I, § 9."

[11] The statutes upheld in *Sioux Nations* and *Robertson* were far more directly aimed at particular cases than is Section 27A(b).

[12] Any concern that reopening final judgments would render them "advisory opinions" would be unfounded. Since the cases involved "cases and controversies" between opposing parties when the opinions were rendered, U.S. Const. art. III, the opinions were not advisory when rendered. Subsequent changes in the law do not render opinions advisory.

Securities, this Court upheld as constitutional state legislation amending a limitation period for a state securities claim and reviving securities claims previously adjudicated to be time barred. *See also International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) (Congress had the constitutional power to extend the period for filing discriminatory charges with the EEOC and to apply the longer period retroactively to revive charges that would otherwise have been time barred).

As this Court explained in *Chase Securities*, the protection provided by a statute of limitations "has never been regarded as what is now called a 'fundamental' right." 325 U.S. at 314. Legislatures therefore enjoy broad discretion to "repeal or extend a statute of limitations, even after [the] right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar." *Id.* at 311-12.[13] Like a statute of limitations itself, a judgment resting on a statute of limitations is not "fundamental" and is not immune from legislative reopening. As this Court stated in *Paramino Lumber*, "the immunity obtained by the lapse of the time for review is

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[13] In *Chase*, this Court noted that the case was "not one where a defendant's statutory immunity from suit had been fully adjudged so that legislative action deprived it of a final judgment in its favor." 325 U.S. at 310. As discussed in the Section I.B, *supra*, however, this Court has upheld other statutes divesting parties of rights acquired in a final judgment. *See, e.g., Fleming v. Rhodes*, 331 U.S. 100 (1947); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431 (1855); *Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940). Accordingly, that dictum in *Chase* thus does not support respondents' position.

[not] the type of immunity which protects its beneficiary from retroactive legislation authorizing review of the claim." 309 U.S. at 378.[14]

Since any property right respondents and the others who received a windfall from retroactive application of the *Lampf* rule had in a judgment based on the statute of limitations was not "fundamental," Section 27A(b) survives due process scrutiny so long as it is rationally related to a legitimate government interest. *See Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 729 (1984) ("the strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively"); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). As discussed below, Section 27A(b) was not only rational, but compelled by justice and equity.

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[14] Respondents and other defendants similarly situated cannot tenably argue that they relied to their detriment on these judgments. At the time of the conduct underlying these suits, the statutes of limitations were longer, and respondents and other defendants ordered their affairs accordingly. The time period between the retroactive application of the *Lampf* rule and Congress' enactment of Section 27A was only a few months. During that time period, respondents and other defendants were aware that Congress was considering legislation as a result of the retroactive application of the *Lampf* rule, and knew that pursuant to Fed. R. Civ. P. 60(b) courts might void their windfall judgments based on the new legislation.

B. Section 27A(b) Easily Passes Rational Basis Scrutiny.

"Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). Section 27A(b) was rationally designed to protect the legitimate interests of securities fraud victims who filed suit before the *Lampf* decision in reliance on the then-accepted statute of limitations, *see* 137 Cong. Rec. S17315 (daily ed. Nov. 21, 1991) (Senator Riegle), and to prevent an undeserved windfall for culpable parties by restoring the status quo prior to *Lampf* and confirming the expectations of the parties.[15]

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[15] Congress was also legitimately concerned with the adverse impact of *Lampf* and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), upon private enforcement of the securities laws. *See Securities Investor Protection Act of 1991: Hearings on S. 1533 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 102d Cong., 1st Sess. 2 (1991) (Sen. Bryan); *id.* at 15-16 (Richard C. Breeden, Chairman, SEC); *Securities Investors' Legal Rights: Hearings on H.R. 3185 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 38-39 (1991) (Rep. Markey and Chairman Breeden); *id.* at 21-24 (Chairman Breeden); *cf. Basic, Inc. v. Levinson*, 485 U.S. 224, 230-231 (1988) (private suits are "an essential tool for enforcement" of the Securities Exchange Act).

As discussed in Section I.A. above, Section 27A(b) was far more than rational. It was a meaningful legislative response to a compelling social and economic problem. Section 27A(b) counteracted a windfall that retroactive application of *Lampf* temporarily provided culpable defendants, and alleviated unfairness to victims of fraud, including those who had the misfortune to have judges quickly apply *Lampf* retroactively in their cases and who decided that filing an appeal was not appropriate. It made our financial markets more stable and secure.[16]

In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), this Court held that "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." Respondents cannot come close to meeting that burden with respect to Section 27A.

CONCLUSION

The enactment of Section 27A(b) was a proper exercise of Congress' legislative authority. Congress amended this nation's statutory law to prevent unfairness and injustice caused by the retroactive application of a new judicial rule.

[16] The Fifth Circuit was thus correct in finding "that § 27A(b) should survive any heightened scrutiny," if such scrutiny were required, but concluding that it need not survive heightened scrutiny, simply rational basis review. *See Pacific Mutual Life Ins. Co. v. First Republicbank*, 997 F.2d at 51 n.14 (5th Cir. 1993).

Nothing in the Constitution or in this Court's decisions makes that legislative act violative of separation-of-powers principles or of due process. Accordingly, this Court should reverse the Sixth Circuit, and uphold Section 27A(b) as constitutional.

Dated: San Francisco, California
July 19, 1994

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(6)

No. 93-1121

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ED PLAUT, *et al.*,
Petitioners,
v.
SPENDTHRIFT FARM, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR PACIFIC MUTUAL LIFE INSURANCE CO. IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF FOR PACIFIC MUTUAL LIFE INSURANCE CO. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pacific Mutual Life Insurance Company hereby moves, pursuant to Rule 37.4 of the Rules of this Court, for leave to file the attached brief *amicus curiae* in support of petitioners. Counsel for petitioners, for respondents Spendthrift Farm, Gibson, Dunn & Crutcher, and Francis M. Wheat, Deloitte & Touche, and for the United States have consented to the filing. Counsel for respondent Bateman, Eichler, Hill Richards, Inc. has declined to consent. Counsel for Norman D. Owens and American International Bloodstock Agency, Inc., has not responded to the request for consent.*

The question presented in this case—the constitutional validity of Section 27A(b) of the Securities Exchange

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* Pacific Mutual has no parent corporation, and its subsidiaries, other than wholly owned ones, are World-Wide Holdings Ltd. (a United Kingdom corporation) and United Planners Group, Inc. (an Arizona corporation). *See* S. Ct. R. 29.1.

Act (Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387, codified at 15 U.S.C. § 78aa-1(b))—was presented last Term in *Morgan Stanley & Co. et al. v. Pacific Mutual Life Ins. Co.*, No. 93-609. The Court there affirmed, by an equally divided vote, the Fifth Circuit's judgment holding Section 27A(b) constitutional. 114 S. Ct. 1827 (1994). The Court subsequently denied the petitioners' request for rehearing or a stay of mandate in *Morgan Stanley*, returning the case to the lower courts, where (if the Fifth Circuit sends the case back to the district court) Pacific Mutual will resume pre-trial and trial proceedings on its claim for damages from securities fraud committed by the Morgan Stanley petitioners. 62 U.S.L.W. 3862 (1994). The Morgan Stanley petitioners have already indicated that, if the Court holds Section 27A(b) invalid in the present case and the *Morgan Stanley* litigation is still pending at that time, they will raise the ruling as a ground for dismissing Pacific Mutual's complaint. *See* Brief in Support of Rehearing, No. 93-609, at 5. Pacific Mutual therefore has a substantial interest in the resolution of this case, as well as an additional perspective on the questions presented, sharpened in the litigation of those issues last Term.

For those reasons, Pacific Mutual asks that its motion be granted.

Respectfully submitted,

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QUESTION PRESENTED

Whether Section 27A(b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78aa-1, to the extent that it purports to require reinstatement of Section 10(b) actions dismissed with prejudice pursuant to judgments that became final prior to the enactment of Section 27A(b), contravenes the separation-of-powers doctrine or the Fifth Amendment Due Process Clause of the United States Constitution.

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BRIEF FOR PACIFIC MUTUAL LIFE INSURANCE CO. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The interest of Pacific Mutual Life Insurance Company is stated in the accompanying motion.[1]

SUMMARY OF ARGUMENT

Congress enacted Section 27A of the Securities Exchange Act, 15 U.S.C. § 78aa-1, to create, retroactively, a new statute of limitations for certain securities fraud plaintiffs. The Sixth Circuit, while accepting the validity of subsection (a)'s application of the new statute of limitations to pending cases, invalidated subsection (b)'s application of the new rule to cases under the old statute

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[1] Pacific Mutual has no parent corporation, and its subsidiaries, other than wholly owned ones, are World-Wide Holdings Ltd. (a United Kingdom corporation) and United Planners Group, Inc. (an Arizona corporation). *See* S. Ct. R. 29.1.

that had come to an end ("final cases"), finding a rigid constitutional rule protecting the sanctity of "final" judgments. *See Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487 (1993). It rested this rule on the Constitution's separation of powers. But the rigid pending/final rule the court of appeals announced, and its consequent invalidation of Section 27A(b), are simply insupportable under a straightforward analysis of separation-of-powers principles, or of due process principles.

I. SEPARATION OF POWERS

As affirmative authority, the court relied entirely on the principle of *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), but that principle is irrelevant here. *Hayburn's Case* and its progeny state a limit on the courts' jurisdiction, applicable where a statute *at the time of judicial decision* renders the court unable on its own to award relief, treating it instead as a first step in a process requiring further independent determination by another Branch; such a statute effectively makes the court into a magistrate for another Branch and deprives the dispute of its character of a "case or controversy." That bar on assignment of non-judicial powers to the Article III courts has never been used, and could not logically be used, to invalidate a post-judgment statute because of its effect on a prior judgment. The doctrine of *Hayburn's Case* is simply beside the point in respondents' challenge to Section 27A(b).

Complementing the constitutional bar on assignment of non-judicial power to Article III courts (which is irrelevant here) is the constitutional bar on congressional usurpation of the judicial power, which seems to have been the real concern of the Sixth Circuit. *See Plaut*, 1 F.3d at 1498-99. But that principle, in terms of both text and underlying values, provides no support for the Sixth Circuit's formal, absolute pending/final line. What this core principle prohibits is congressional *adjudication* of specific cases—which is equally forbidden regardless of the pending or final status of the case Congress is adjudicating.

Section 27A(b) is obviously immune from this flaw, as the recognized validity of Section 27A(*a*), applying the limitations rule to pending cases, inescapably implies. Congress has not engaged in case-specific adjudication, but has altered the preexisting governing (limitations) law, leaving for the courts the entire task of finding facts, interpreting the law, and applying the law to the facts. *See, e.g., Robertson v. Seattle Audubon Soc'y*, 112 S. Ct. 1407 (1992); *United States v. Sioux Nation*, 448 U.S. 371 (1980). Congress therefore has not usurped the judicial power.

Nor does Section 27A(b) violate any broader structural separation-of-powers principle barring impairment of the courts' independent functioning. The statutory purpose plainly reflects no questioning of the independent law-interpreting or fact-finding judgment of the courts: it alters the substantive law, a properly legislative function, for the most legitimate of reasons. And the effect of the statute, which is of course narrowly confined to an unusual problem presented in a small number of cases, is in no sense to hamper the courts' functioning.

II. DUE PROCESS

Section 27A(b) readily meets the rationality standard for assessing substantive due process challenges to retroactive statutes even where they clearly upset settled expectations. *See, e.g., General Motors v. Romein*, 112 S. Ct. 1105, 1112 (1992); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). The retroactivity of Section 27A(b) precisely serves two related interests. First, it protects the legitimate expectations of plaintiffs who sued based on the governing limitations law prior to *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilberston*, 111 S. Ct. 2773 (1991). *See Plaut*, 1 F.3d at 1498 ("True, the litigants had proceeded under the assumption that the Kentucky Blue Sky law would apply," making the suit timely). Second, it en-

sures that a class of defendants accused of securities fraud are not allowed to escape liability without even having to answer the fraud charges. Indeed, these purposes, together with the implausibility of the claim that Section 27A(b) upsets defendants' reasonably settled expectations at all, mean that Section 27A(b) survives due process scrutiny under any standard short of an absolute rule protecting "final judgments."

There is no basis for such a rule. No holding of this Court establishes such a rule; and in any event, whatever language may appear in opinions from a bygone era of substantive due process, "vested rights" like contract and property rights are now covered by the rationality test. *See, e.g., United States v. Locke*, 471 U.S. 84, 104-05 (1985). The presence of a judgment "vesting" a preexisting legal right supplies no ground for a different standard. Indeed, it would be bizarre to afford higher (much less) absolute protection to rights sufficiently in dispute to have been litigated, simply because a final judgment has resolved the dispute, when property or contract rights so clear that they were never disputed in litigation remain subject to the lesser protection of the rationality standard.

Finally, if any judgments warrant any special protection against legislative disturbance, the judgments affected by Section 27A(b) are not among them. These judgments, entered only months before the legislation was enacted, had no effect but to relieve alleged malefactors of having to answer fraud charges on their merits, based entirely on a determination that the suits were not timely filed—under an interpretation of the governing statute of limitations that itself was unexpected. The statute then simply removed the limitations objection from the case. There is no justification for any special bar on legislation that thus reaches briefly back in time to eliminate a procedural defect to the consideration of serious charges on their merits, even if that defect resulted in an unappealed judgment.

ARGUMENT

Congress indisputably has broad legislative power to enact new legal standards and apply them to past events, protecting interests unprotected by preexisting law.[2] In particular, Congress may enact a new statute of limitations for plaintiffs who are out of time under the old statute, enabling them to pursue recovery for the wrongful conduct of defendants.[3] Under those principles, as the federal circuits have uniformly held, it is not seriously questionable that Congress could validly create a new (limitations) rule in Section 27A and make that rule available to plaintiffs whose cases under the preexisting rule were meritless (out of time) if those plaintiffs' cases were still "pending," whether in the district courts, in the courts of appeals, or in this Court. *See, e.g., Plaut*, 1 F.3d at 1493 n.11, 1495, 1496. The Sixth Circuit held, however, that the Constitution draws a sharp line prohibiting Congress from extending any new rule (here, the new limitations rule) to plaintiffs whose cases under the preexisting rule were meritless (here, out of time) if those cases had become "final" in a particular sense, *i.e.*, were no longer subject to trial-court or appellate-court review under currently applicable statutes and Rules.

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[2] *See, e.g., United States v. Carlton*, 114 S. Ct. 2018, 2021-22 (1994); *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1501 (1994); *United States v. Sperry Corp.*, 493 U.S. 52 (1989); *R.A. Gray & Co.*, 467 U.S. at 729-33; *Turner Elkhorn, supra; United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). *See also Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 844, 849 (1990) (Scalia, J., concurring), citing, as cases involving express retroactive legislation, *Watson v. Mercer*, 33 U.S. (8 Pet.) 88 (1834); *Graham & Foster v. Goodcell*, 282 U.S. 409 (1931); *Freeborn v. Smith*, 69 U.S. (2 Wall.) 160 (1864); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899); *Carpenter v. Wabash R. Co.*, 309 U.S. 23 (1940); and *Dickinson Indus. Site, Inc. v. Cowan*, 309 U.S. 382 (1940).

[3] *See Electrical Workers Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 243-44 (1976); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 316 (1945).

The immediate consequences of this rigid line between pending and final cases should by themselves be enough to raise doubts about the court of appeals' constitutional ruling. Under that ruling, defendants who have obtained final judgments under preexisting law acquire a constitutional immunity from the application of new law to them. But when Congress decides to confer a new legal right on individuals, it is hard to see why Congress should be constitutionally entitled to extend the right to individuals who never brought claims under preexisting law and to individuals who brought claims that are still pending, but not to individuals who brought claims that were finally adjudicated—such claims being equally meritless in all three situations (which is precisely why Congress finds it necessary to create the new right). In barring the equal treatment manifested in Section 27A, moreover, the Sixth Circuit's ruling would penalize those plaintiffs who are diligent enough to press their rights but responsible enough to refrain from pursuing merely dilatory appeals, and thus encourage the filing of meritless appeals to keep cases alive while awaiting expected legislation.[4] These results produce windfalls to certain defendants and disparities in treatment unrelated to any apparent interest in justice and, indeed, an incentive toward litigation conduct that is hardly consistent with the idea of respect for the courts.

Although the court of appeals rested its decision entirely on a rigid, formal line between pending and final

[4] All of the cases affected by Section 27A(b) *could* have been kept alive by filing purely protective appeals or certiorari petitions. This case, for example, was dismissed in mid-August 1991. With 30 days for an appeal and 90 days for a certiorari petition (together with minimal periods for responses and judicial action), the case, like all others affected by the June 1991 decision *in Lampf*, could easily have been maintained in "pending" status until the mid-December enactment of Section 27A. Of course, while appeals at the time "would have been . . . meritless and indeed sanctionable" (*Plaut*, 1 F.3d at 1489), the enactment of Section 27A would have transformed such appeals from sanctionable ones into indisputably meritorious ones.

cases, the court supplied no explanation of *why* such a bright line makes sense in terms of constitutional text or constitutional principles. As a result of that omission, the court plainly misread the relevant precedent (and history). In fact, no sound constitutional derivation of the pending/final line is possible. The constitutional challenge to Section 27A(b), in the end, rests only on formal invocation of labels and cannot be rooted in the substance of the relevant constitutional principles.[5]

I. SECTION 27A(b) DOES NOT VIOLATE THE CONSTITUTIONAL SEPARATION OF POWERS.

The Sixth Circuit's opinion on its face reflects a strongly felt belief that a statute effecting a reopening of "final" judgments represents an offensive intrusion on judicial business. The court's sense of affront, however, is misplaced. Any such reaction should be dispelled by straightforward analysis of the relevant constitutional principles and (in light of those principles) relevant precedents, which shows that Section 27A(b) presents no constitutional problem. Congress has not (i) assigned nonjudicial power to the Article III courts, (ii) itself usurped

[5] This case presents no claim under the takings clause. *See* 62 U.S.L.W. 3806 (1994) (stating question presented); *Yee v. City of Escondido*, 112 S. Ct. 1522, 1531-34 (1992). Nor could it: if the due process attack on Section 27A(b) fails, as it does, the argument would fare no better repackaged as a takings claim. *See Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2289-92 (1993); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 222-23 (1986); *see also Sperry Corp., supra*. It could not reasonably be said that the defendants whom Section 27A(b) compels to answer securities-fraud suits against them are "being forced to bear a burden 'which, in all fairness and justice, should be borne by the public as a whole.'" *Concrete Pipe*, 113 S. Ct. at 2292 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Not surprisingly, it is hard to find precedent treating a mere judgment of non-liability, which is not readily viewed as a transferable asset with market value, as "property" within the meaning of the takings clause. Of course, a judgment awarding a sum of money or confirming title to property would present a quite different situation under the takings clause.

the exercise of judicial power, or (iii) otherwise impaired the courts' independent performance of their proper function.*

A. Section 27A(b) Does Not Impose Non-Judicial Functions on the Article III Courts in Violation of Hayburn's Case.

The court of appeals' separation-of-powers conclusion relied entirely on *Hayburn's Case*, which, the court declared, firmly established a "rule that Congress may not retroactively disturb final judgments of the Federal courts" (1 F.3d at 1493), a rule the court then had to limit, first, to judgments on claims for retrospective as opposed to prospective relief (*id.* at 1494-95) and, second, to judgments between private parties (*id.* at 1497-98). But this reading of *Hayburn's Case* and its progeny simply misunderstands their holdings and their rationales. That

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*We note that we have been unable to determine how often in the past Congress has enacted statutes, like Section 27A(b), setting new legal standards and applying them retroactively to parties with final judgments under old legal standards. On the one hand, it seems unlikely that, for example, coal miners who had finally lost claims for black lung benefits under preexisting law were excluded from the coverage of the legislation at issue in *Turner Elkhorn*, *supra*. On the other hand, one would expect laws like Section 27A(b) to be relatively rare, given Congress's avoidance of retroactive laws generally and this Court's long approval, until recently, of prospective adjudication in "law-changing" decisions, making it less necessary for Congress to act to protect reliance interests of litigants as it did in Section 27A. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). One prominent recent statute affecting "final" judgments—retroactively providing for attorney's fees for handicapped children suing to enforce their education rights—was upheld by the lower courts. *See Tonya K. v. Board of Education*, 847 F.2d 1243 (7th Cir. 1988); *Capello v. D.C. Board of Education*, 669 F. Supp. 14 (D.D.C. 1987).

Of course, the novelty of a measure is not itself a reason for finding it unconstitutional. *See, e.g., Mistretta v. United States*, 488 U.S. 361 (1989); *Morrison v. Olson*, 487 U.S. 654 (1988); *CFTC v. Schor*, 478 U.S. 833 (1986).

line of authority forbids the Article III courts to accept jurisdiction where statutes in place *at the time* of the judicial decision mean that the judgment sought from the court could not itself afford relief (but would require, to be effective, some subsequent independent action by another Branch). This bar on assigning "non-judicial" tasks to the Article III courts is utterly irrelevant here: it simply has nothing to do with, and has never been used to challenge, a statute that is enacted *after a judgment* has been rendered, based on its allegedly improper effect on the earlier judgment.

Thus, in *Hayburn's Case* itself, the circuit courts were directed to rule on veterans' pension claims, but the results were merely to be transmitted to the Secretary of War for the Secretary, and ultimately Congress, to decide if the claims should be paid. 1 Stat. 243 (1792). The opinions of several Justices, sitting as Circuit Judges, explained that the assigned task was not "judicial" because the statute defining the task subjected the decision, before it could have any effect, to the action of non-Article III authorities. 2 U.S. (2 Dall.) at 411-14. The result was that the assigned task, amounting to performing the role of commissioners in an executive process, could not be accepted by an Article III court.

Although the Sixth Circuit did not examine the decisions following *Hayburn's Case*, all of them involve the very same circumstances and holdings: the jurisdiction-defining statute itself limited the court's power to grant relief, depriving the determination of its "case or controversy" character, and the courts therefore declined jurisdiction. In *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52 (1851), this Court dismissed, "for want of jurisdiction," an appeal from a damages award rendered by a district judge under a statute that expressly made the award subject to the redetermination of the Secretary of the Treasury. In *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1864), this Court held that, as an Article III court, it could not take jurisdiction over

an appeal from a decision by the Court of Claims because the statute giving jurisdiction to the Court of Claims by its terms gave the Executive the authority " 'to revise all the decisions of that court requiring payment of money.' " *United States v. Jones*, 119 U.S. 477, 478 (1886) (quoting Chief Justice Taney's explanation in announcing judgment in *Gordon*); *see Gordon*, 117 U.S. 697, 703 (1885).[7] In *In re Sanborn*, 148 U.S. 222 (1893), the Court likewise held that it could not take jurisdiction over an appeal from certain Court of Claims decisions that were still subject to non-Article III revision.[8] And in *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948), the Court held that Article III courts could not take on cases about the propriety of a Civil Aeronautics Board decision on the award of a foreign air carrier route, where the resolution of the case, by virtue of the jurisdiction-defining statute in place at the time, "ha[d] only the force of a recommendation to the President." *Id.* at 113.[9]

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[7] Immediately after *Gordon* was decided, Congress repealed the provision subjecting the relevant Court of Claims decisions to executive revision, and those decisions thereby became fit for Article III review. *United States v. Jones, supra; see also La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899).

[8] In *District of Columbia v. Eslin*, 183 U.S. 62 (1901), the Court confirmed the principle of this line of cases when it held that it must dismiss an appeal because Congress had repealed the cause of action, making relief impossible. In *Muskrat v. United States*, 219 U.S. 346, 352-55 (1911), the Court again relied on the principle established in *Hayburn's Case*, *Ferreira*, and *Gordon* to hold that an Article III court may not render a purely advisory opinion (on a statute's constitutionality), where the decision would furnish no concrete relief. *See also United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386 (1934) (Article III courts cannot "give or review judgments" that, at the time, are "conditioned" on agency revisory authority; therefore, plaintiff's entitlement to money must be decided in refund action).

[9] *United States v. O'Grady*, 89 U.S. (22 Wall.) 641 (1874), held that once Congress had made the Court of Claims' cases into Article III controversies, subject to Supreme Court review, those *statutes* meant that the Executive lacked authority to revise a Court of Claims judgment before paying it. *United States v. Waters*, 133 U.S. 208 (1890), likewise turned on a statutory conclusion.

These cases thus establish a constitutional constraint on the jurisdiction assumable by Article III courts, barring such jurisdiction where statutes in place at the time of decision limit the court's relief authority and thereby destroy the "judicial," or "case or controversy," character of the assigned task. Here, as in the other cases affected by Section 27A(b), however, there was at all times a live case or controversy for the district court to resolve—with no lack of concrete stakes, no deficiency in adversarial incentive, and no threat to judicial independence (or dignity) from acting as a magistrate for another co-equal Branch. The district court had one set of laws to apply prior to *Lampf*, another set in the months after *Lampf*, and still another set after Congress restored the pre-*Lampf* limitations period. But at every moment, the task for the court was entirely judicial in the fullest constitutional sense: the court's determination could itself provide relief, without need for further independent action by any non-Article III authority. Quite simply, there is no *Hayburn's Case* problem in this case.

The Sixth Circuit's complete misreading of *Hayburn's Case* is betrayed by the need it found to make two exceptions to its initially absolute rule forbidding congressional alteration of an earlier judgment. Without explanation of what Article III principle gave rise to the exceptions, the court deemed *Hayburn's Case* not to apply to suits against the United States and to suits seeking judgments awarding prospective relief—the first exception accommodating this Court's decisions in *United States v. Sioux Nation*, 448 U.S. 371 (1980) (and *Cherokee Nation v. United States*, 270 U.S. 476 (1926), and *Pope v. United States*, 323 U.S. 1 (1944)); the second accommodating the decisions recognizing Congress's power to alter the law and thereby compel modification of a prospective judgment (*e.g., Pennsylvania v. Wheeling & Belmont Bridge Co.*,

59 U.S. (18 How.) 421 (1855); *The Clinton Bridge*, 77 U.S. (10 Wall.) 454 (1870)). But the doctrine of *Hayburn's Case* plainly makes neither an exception for prospective judgments (*e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., supra*) nor an exception for cases against the United States (*see Hayburn's Case, Ferreira, Gordon*, etc.). The Sixth Circuit's need to trim the doctrine to fit the desired focus on post-judgment statutes confirms that the doctrine has nothing to do with such statutes.

Contrary to the Sixth Circuit's evident misunderstanding, *Hayburn's Case* does *not* state a constitutional bar on statutes that nullify the effect of federal court judgments. If that were the concern, statutes that nullify a district court's judgment would be called into question even if enacted while the case was pending on appeal. But *Hayburn's Case* has no such effect (*see, e.g., Schooner Peggy, supra*), because such a statute does not somehow retroactively undo the case-or-controversy character of the district court judgment at the time it was entered. A statute enacted after appellate review is exhausted no more impairs the Article III nature of earlier judgments.

Only a statute that, at the time of decision, makes the judicial determination "subject to later review or alteration" violates the principle of *Hayburn's Case* and thus justifies refusal to accept jurisdiction. *Chicago & Southern Air Lines*, 333 U.S. at 114. There was no such statute in this case. Accordingly, any separation-of-powers claim that Section 27A(b) is invalid because of its effect on pre-enactment judgments must look to some principle other than that found in *Hayburn's Case*.

B. Section 27A(b) Does Not Represent a Congressional Usurpation of Judicial Authority.

The Constitution, in addition to barring the Article III exercise of non-judicial power, textually prohibits Congress from exercising judicial power. It was this principle that the Sixth Circuit seemed to focus on in questioning

whether Section 27A(b) represents a usurpation of judicial power. 1 F.3d at 1499. Having recognized the principle, however, the Sixth Circuit failed to identify what that principle protects and, as a consequence, incorrectly adopted a pending/final line that bears no correspondence to this constitutional constraint and incorrectly found Section 27A(b) invalid.

Unlike other statutes that may be easily imagined, Section 27A(b) should quite readily be seen to present no problem under the constitutional prohibition on congressional exercise of judicial power. The simple and sufficient reason is that Congress did not make any case-specific adjudicatory decisions: rather, it changed the law and left findings of fact, interpretation of law, application of law and decision, and other case-specific determinations to the courts. Indeed, if the focus is on the substance of the congressional action, as it should be, then the validity of Section 27A(b) follows directly from the validity of Section 27A(a). It is the undisputable character of Section 27A as a proper legislative change of legal standards, rather than any sort of adjudicatory act, that underlies the universal acceptance of the validity of the statute applying the new limitations period to *pending* cases. Application of the very same congressional change of law to "final" cases does not in any substantive way transform what Congress did into an adjudicatory act.

To accuse Congress of having usurped judicial authority in this case, then, the Sixth Circuit had to disregard the nature of the congressional action and focus exclusively on the reopening of a final judgment as a *per se* assumption of judicial power—even by a non-adjudicatory congressional change of law. But such a refusal to look at the character of the decision made by Congress is insupportable. There is no basis to question the sensible and deeply rooted understanding that case-specific adjudication—finding facts, interpreting existing law, directing the entry of judgments, framing remedies, perhaps making other case-specific determinations—is a necessary

defining characteristic of the judicial power. *See, e.g., Robertson*, 112 S. Ct. at 1413 ("we find nothing in [the statute] that purported to direct any particular findings of fact or application of law, old or new, to fact"); *Freytag v. Commissioner*, 111 S. Ct. 2631, 2655 (1991) (Scalia, J., concurring) (to " 'adjudicate,' *i.e.*, . . . determine facts, apply a rule of law to those facts, and thus arrive at a decision . . . [is a] necessary . . . condition[] for the exercise of federal judicial power"). Because Congress engaged in no case-specific adjudication, it did not exercise judicial power in enacting Section 27A(b).[10]

The Sixth Circuit's focus on "finality" for its own sake, rather than on the nature of the congressional decision, finds no support in the text of Article III. Nothing there speaks of "finality," much less assumes or constitutionalizes any particular set of rules for appealing, reopening, or otherwise further reviewing judgments—rules that, of course, have changed considerably over the years.[11] Nor do the historical materials cited by the Sixth Circuit (1

[10] One aspect of the bar on congressional exercise of the judicial power is presented in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), where Congress ordered a disposition of a specific case (directing this Court, in a case on appeal from the Court of Claims, to order dismissal of the complaint) based on an improper congressional determination of the legal effect of a presidential pardon. As the Sixth Circuit itself recognized (1 F.3d at 1497 n.14), *Klein* could not support the asserted rigid bar on congresssional reopening of "final" judgments. Moreover, Section 27A(b), as a change of law with adjudication left to the courts, does not otherwise present any problem under *Klein*. This Court's recent decision in *Robertson, supra*, is nonetheless instructive here, in its unanimous understanding that a law-changing statute was not judicial even though it addressed particular cases by docket number. 112 S. Ct. at 1411.

[11] For example, under the old "term" system, a district court had plenary authority to alter its judgments during the same "term," which in many instances would have continued during the August-to-December period required for all cases affected by Section 27A to have been "pending." *See, e.g., Hill v. Hawes*, 320 U.S. 520, 524 (1944); 6A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 60.04, at 60-31 (2d ed. 1993); 7 *id.* ¶ 60.09, at 60-65.

F.3d at 1490-91) reveal any objection to impairment of finality *per se*. Rather, the common feature of the identified legislative actions was their case-specific adjudicatory character—quite irrespective of whether there had previously been any final judgment or, indeed, any judicial proceedings at all.[12]

Not surprisingly, then, the central policy underlying the separation of the Article III courts into a politically independent Branch has nothing to do with finality for its own sake. That guarantee of independence, instead, has everything to do with the case-specific nature of governmental determinations: political independence is important for deciding the rights of identified parties through adjudicatory determinations—findings of fact, interpretations of existing law, fashioning of case-specific remedies, etc. Political independence is irrelevant, and indeed antithetical, to the enactment of new legal standards, including a new statute of limitations.

Precedent, too, supports rejection of the notion that congressional reopening of an Article III judgment is *per se* an exercise of judicial power. This Court has upheld statutes even when Congress has not changed the governing law, but instead *only* provided for reopening (or, what seems the same thing, further appellate review not otherwise available), even in individually identified cases. That was, in fact, precisely the holding of *United States v. Sioux Nation, supra*.[13] And contrary to the Sixth

[12] The quotes set forth in the Sixth Circuit opinion (1 F.3d at 1490-91 & nn.7, 8) speak for themselves in this regard. So, too, the listing of legislative actions in *Judicial Action by the Provincial Legislature of Massachusetts*, 15 Harv. L. Rev. 208 (1901-02) (cited at 1 F.3d at 1490 n.7), discloses that the common thread making them "judicial" was their case-specific adjudicatory character; nothing distinctive about final judgments can be inferred from the mix of listed actions—some of which affected final judgments, some pending cases, and some disputes not in litigation at all.

[13] This Court has likewise upheld such statutes as applied to the judgments (treated as such for full faith and credit purposes) of territorial courts and administrative tribunals. *See, e.g., Paramino Lumber Co. v. Marshall*, 309 U.S. 370 (1940); *Stephens v. Cherokee*

Circuit's view, the fact that the United States was a party in *Sioux Nation* is irrelevant to the *Article III* issue of whether congressional reopening of an Article III judgment is *per se* an exercise of judicial power.

The question of congressional authority to require relitigation of the claim presented in *Sioux Nation*, without *res judicata*, necessarily involved two components: is reopening automatically an exercise of judicial authority? and if not, what specific legislative authority does Congress have in Article I to eliminate *res judicata*? The party status of the United States was key to the second step in the Court's upholding of the statute—namely, to locate the particular legislative power underlying the enacted statute, which merely directed the Court of Claims to ignore *res judicata*. The Court held that the debt-paying power set forth in Article I, § 8, authorized the waiver of *res judicata*. But the waiver notion and debt-paying power have no bearing on the *Sioux Nation* Court's first necessary step, concluding that reopening a final judgment of an Article III court is *not* a uniquely judicial power.[14] It is that proposition, unaffected by the identity of the defendant, which suffices to undermine the Sixth Circuit's holding here.[15]

In any event, Section 27A(b) presents even less of a separation-of-powers issue than the statute upheld in *Sioux Nation*, since Section 27A(b) undeniably creates new law

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Nation, supra; Freeborn v. Smith, supra; Sampeyreac v. United States, 32 U.S. (7 Pet.) 222 (1833).

[14] After all, the "waiver of *res judicata*" that the Court found authorized by the debt-paying power could easily have been exercised by Congress itself, a Committee, or some Article I tribunal. The validity of requiring involvement of the Article III courts requires reasoning apart from the notion of waiver. By the same token, the interest of the Article III courts in independent functioning does not change based on the identity of the parties before them.

[15] Of course, the source of legislative power in this case presents no difficulty, since Section 27A(b) plainly rests on the Commerce Clause power to enact a statute of limitations for securities cases.

applicable in a generally defined class of cases, as opposed to merely requiring an Article III court to engage in relitigation of one individually identified dispute. *See, e.g., Pope v. United States, supra; Cherokee Nation v. United States, supra.* Thus, Section 27A(b) does not present either of the two features that appear key to the dissent in *Sioux Nation*: the statute in *Sioux Nation* applied to precisely one identified case and changed no law except the rule of finality (*res judicata*, preclusion).[16] Thus, this Court need not decide here in what circumstances, if any, Congress may have power to enact statutes changing only finality rules for purely private cases. Section 27A(b) plainly does more: it applies to a generally described class of cases and it does change the law to be applied. That is a proper legislative, not a judicial, act.

Section 27A(b), then, is in substance nothing but the creation of a new cause of action for certain securities fraud plaintiffs. In the absence of a formal bright line in the Constitution itself, there is no sound basis for refusing to look to the substance of this legislation in judging its validity.[17] Indeed, where as here the text does not

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[16] The majority in *Sioux Nation* viewed the statute as creating "a new legal right" (448 U.S. at 407), whereas the dissent viewed it otherwise. 448 U.S. at 431 ("Congress has not changed the rule of law, it simply directed the judiciary to try again.").

[17] In this respect, this case is quite different from *INS v. Chadha*, 462 U.S. 919 (1983), *Bowsher v. Synar*, 478 U.S. 714 (1986), and *Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298 (1991), each of which ultimately rested on textually plain reasoning (supported by underlying structural principles): "If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7." 111 S. Ct. at 2312. Moreover, even the dissents in *Morrison v. Olson, supra*, and *Mistretta, supra*, rested on the view, rooted in the text, that each challenged statute involved an exercise of governmental power outside the constitutional structure in the simple sense that the power was not exercised by, or subject to the

speak clearly, this Court has ruled repeatedly that " 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.' " *CFTC v. Schor*, 478 U.S. 833, 848 (1986) (quoting *Thomas v. Union Carbide Agricultural Prod. Co.*, 473 U.S. 568, 587 (1985)); *see Robertson*, 112 S. Ct. at 1414 (rejecting argument based on form of law where equivalent in substance was constitutional). *See also, e.g., West Lynn Creamery, Inc. v. Jonathan Healy*, 62 U.S.L.W. 4518, 4523 (1994) (rejecting form over substance in Commerce Clause application).

That focus on substance means, in the present context, that what matters is whether Congress has engaged in case-specific adjudication. If it has, the congressional action should be invalid whether the affected case is pending or final. But if it has not, the congressional action should be valid whether the affected cases are pending or final. As the accepted validity of Section 27A(a) establishes, Section 27A(b) falls into the latter category —valid as a legislative, not judicial, exercise of power.

C. Section 27A(b) Violates No Broader Separation of Powers Principle.

Section 27A(b) readily passes muster under a broader, less textually focused separation-of-powers standard forbidding congressional actions that unduly encroach on or impair the effective functioning of another Branch, including the Article III courts. *See, e.g., Mistretta v. United States*, 488 U.S. at 381-82; *CFTC v. Schor*, 478 U.S. at 850. A serious problem would be presented if Congress took action with the purpose or with the effect of chilling or impairing the courts' independent performance of their adjudicatory duties—by, for example, imposing a general rule requiring or approving relitigation

control of, the Congress, the President, or the courts—the sole repositories of the powers vested by Article I, Article II, and Article III. The Sixth Circuit's pending/final rule, by contrast, cannot in any comparable way be read off the face of the Constitution's assignment of powers.

of massive numbers of already-decided cases or by forcing relitigation for no reason other than a change in judicial personnel. But such improper purposes or effects, which may equally infect a statute applicable to pending cases, cannot support the Sixth Circuit's special rule for laws affecting final cases. And Section 27A(b) cannot remotely be faulted as effecting any systemic impairment or serving purposes inconsistent with the constitutional commitment of judicial independence.

Section 27A(b) has no disabling impact on the functioning of the Article III judiciary. Although not case-specific (there is no evidence Congress knew what cases would be pending or final when Section 27A was enacted), the provision applies only to the very small number of cases that were caught by surprise by *Lampf*. *Cf. CFTC v. Schor*, 448 U.S. at 851-57 (narrow scope of measure supports its validity). And the purpose of Section 27A(b) has nothing to do with any questioning of the independent judgment of courts. Congress made a substantive change of legal standards (applying it retroactively, as it is entitled to do) because of a perceived injustice in the preexisting state of the law. This purpose is no more offensive to any constitutional value as applied to cases where no further review is available (Section 27A(b)) than it is as applied to pending cases (Section 27A(a)), where it is unquestionably valid. Indeed, it is at the heart of Congress's responsibility to reconsider (and, if necessary) amend statutes after the courts make clear their present meaning.[18]

[18] In addition, the properly *legislative* character of the balancing of considerations relevant to prospectivity versus retroactivity of law-changing decisions follows, as a matter of both doctrinal logic and practical need, from this Court's recent decisions suggesting that such balancing is not properly a *judicial* task. *See Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993).

II. SECTION 27A(b) DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

Section 27A(b) readily satisfies the settled substantive due process standards applicable to retroactive legislation. And there is no sound basis in "vested rights" notions for creating a special due process standard for laws that upset otherwise-final judgments. (Of course, the takings clause and contract clause, neither at issue here, provide specific protections for certain vested rights.) Indeed, the judgment at issue here is particularly undeserving of any expansive due process protection.

A. Section 27A(b) Readily Passes the Applicable Rationality Test for Retroactive Legislation.

The standard governing the assessment whether retroactive legislation violates due process is by now firmly established. "Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions. For this reason, '[t]he retroactive aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process': a legitimate legislative purpose furthered by rational means." *General Motors v. Romein*, 112 S. Ct. at 1112 (quoting *R.A. Gray & Co.*, 467 U.S. at 730). *See Carlton, supra; Sperry Corp., supra; Turner Elkhorn, supra.* This test thus recognizes that settled expectations *can* constitutionally be upset, as long as the legislature is rationally pursuing a legitimate objective in doing so. *See Turner Elkhorn*, 428 U.S. at 16 ("legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations") (citing numerous cases) (quoted in *R.A. Gray & Co.*, 467 U.S. at 729-30).

That standard is easily satisfied here. Retroactivity is justified by obvious dual purposes: to protect the expectation interests of plaintiffs who had relied on pre-*Lampf* limitations periods and pursued securities fraud claims; at the same time, to prevent a host of alleged malefactors

from escaping even having to answer fraud charges alleging damages in the billions of dollars. *See Securities Investors Legal Rights: Hearing on H.R. 3185 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 3-6 (1991); 137 Cong. Rec. S18,623-24 (Nov. 27, 1991) (statement of Sen. Bryan). Both of these purposes extend equally to cases where dismissals under *Lampf* were on appeal and cases where no appeals were pending. And the means adopted—a law reaching back only a few months, and no further than the start of legislative consideration (*see Carlton*, 114 S. Ct. at 2023)—were precisely tailored to achieve those objectives; indeed, these means were proposed by representatives of the securities industry.[19] Section 27A(b) is a measure that, far from upsetting the expectations of the complaining party, affirmatively serves the very fairness interest in preserving expectations for which due process provides protection.

B. Invocation of "Vested Rights" Does Not Alter the Governing Standard.

Because Section 27A(b) so plainly meets the governing due process standard, and indeed impairs no legitimately settled expectations at all, any due process challenge to the statute must depend on establishing a special rule treating final judgments as sacrosanct. But this Court's decisions setting forth the modern standard for retroactive legislation, as quoted above, give no hint that judgment-based rights are outside the standard, let alone accorded the absolute protection without which any due process challenge to Section 27A(b) must fail. In particular, invocation of "vested rights" cases cannot justify such a standard.

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[19] The General Counsel of Morgan Stanley, testifying on behalf of the Securities Industry Association, proposed that "the timeliness of all cases pending at the time of the *Lampf* decision—whether or not those cases since have been dismissed—should be determined by application of the law as it stood at that time." *Securities Investors Legal Rights, supra*, at 91-92; *see id.* at 77-78.

To begin with, as this Court pointed out more than one hundred years ago, there is no "vested rights" clause in the Constitution; claims under the due process clause must instead be analyzed in due process terms. *Campbell v. Holt*, 115 U.S. 620, 628 (1885). Not surprisingly, therefore, it is clear that the established rationality standard applies to "vested" contract or property rights, both constituting "property" under the due process clause. *See, e.g., United States v. Locke*, 471 U.S. at 104-05; *National R.R. Passenger Corp. v. Atchison, T. & S.F. R.R.*, 470 U.S. 451, 471-72 (1985); *R.A. Gray & Co., supra*; *Kaiser Aluminum*, 494 U.S. at 856 (Scalia, J., concurring). Nothing about the advancement of a final judgment as the basis for the "vested" right provides a reason to fashion any different standard of due process protection.[20]

Even aside from the far-from-sacrosanct character of "final" judgments (*see* Fed. R. Civ. P. 60(b)),[21] rejection

[20] It is important to distinguish two roles a judgment may play: it may *create* a property right, or it may *vest* a property right. The former—as when a judgment gives rise to a judgment lien—is irrelevant here, having nothing to do with the pending/final line at issue or with "vested rights" doctrine. In any event, nothing about judgment-created property rights warrants distinctive protection over other forms of property (or contract) rights. For example, judicial liens do not have any general priority over liens arising from contracts. *See, e.g.*, D. Epstein, J. Landers, & S. Nickles, *Debtors and Creditors* 9, 48, 346 (3d ed. 1987); *United States v. Ron Pair Enters.*, 489 U.S. 235 (1989). Under 11 U.S.C. § 506, there is generally "no distinction between consensual and nonconsensual liens." *Ron Pair*, 489 U.S. at 242 n.5. Pre-Code bankruptcy law often gave *less* protection to judgment-based liens than to consensual liens (*id.* at 246-48; *id.* at 253-54 (O'Connor, J., dissenting)), as does at least one provision of the current Code (11 U.S.C. § 522(f); *see Farrey v. Sanderfoot*, 111 S. Ct. 1825 (1991)).

[21] Rule 60(b) permits reopening where "'appropriate to accomplish justice,'" with a strong practical eye on systemic needs for finality. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988). This authority has been used to reopen judgments based on a change of law. *See, e.g., Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989); *Matarese*

of a unique standard of protection follows from a straightforward recognition of precisely what the vesting of a right by a final judgment is. The right that is vested is the *underlying right* at issue in the litigation, which itself must be a "property" interest protected by due process; and what the final judgment does is to settle, *i.e.*, confirm or eliminate grounds for dispute about, that right under then-applicable law.[22] But there is no due process reason why a property right sufficiently in doubt to have produced litigation should gain absolute (or even elevated) protection simply because the courts have resolved the dispute, while the generally applicable rationality standard applies to property rights (*e.g.*, in a bond, title to property, limits on contractual obligations) that were so clear and indisputable as never to have been litigated. Indeed, such a ranking of rights would turn the due process interest in settled expectations on its head.

Precedent in no way compels such a senseless result. Absolute protection could hardly be squared with this Court's decisions on many occasions and for many reasons sustaining laws that upset final judgments.[23] And the Court specifically said in *Fleming v. Rhodes* that "rights acquired by judgments have no different standing" for due process purposes from that afforded other "vested"

v. LeFevre, 801 F.2d 98, 106 (2d Cir. 1986), *cert. denied*, 480 U.S. 908 (1987); *McGrath v. Potash*, 199 F.2d 166, 167 (D.C. Cir. 1952); *cf. Polites v. United States*, 364 U.S. 426, 433 (1960).

See also Gondeck v. Pan American World Airways, Inc., 382 U.S. 25 (1965) (granting rehearing four years after denial of certiorari).

[22] *See, e.g., Stewart v. Keyes*, 295 U.S. 403, 417 (1935); *Campbell v. Holt*, 115 U.S. at 623. Without such a final judgment, a court presented with a due process (or takings) challenge to a deprivation of some property would have to establish at the outset that the plaintiff did in fact enjoy the asserted property right under pre-existing law. A pre-enactment final judgment would typically remove that issue from litigation.

[23] *See Fleming v. Rhodes*, 331 U.S. 100 (1947); *Hodges v. Snyder*, 261 U.S. 600 (1923); *Pennsylvania v. Wheeling & Belmont Bridge, supra; Paramino Lumber Co. v. Marshall, supra; Stephens v. Cherokee Nation, supra; Freeborn v. Smith, supra; Freeland v. Williams*, 131 U.S. 405 (1889); *Sampreyeac v. United States, supra.*

rights, such as those gained by contract. 331 U.S. at 107; *see Turner Elkhorn*, 428 U.S. at 16 (citing *Fleming*, which involved a statute upsetting otherwise-final judgments, in setting forth current rationality test for retroactive legislation).

Of course, it is possible to find statements in opinions from an earlier era asserting the special protection of "vested rights" based on final judgments. It is noteworthy, however, that the Court appears never to have rested a holding on such a proposition, not even in *McCullough v. Virginia*, 172 U.S. 102, 123-24 (1898), cited by the Sixth Circuit (1 F.3d at 1493 n.12).[24] Perhaps more important, those statements come from an era when other "vested rights" were likewise given special protection,[25] and that era has long since passed. *See Landgraf*, 114 S.Ct. at 1500-01. Thus, nothing about the older precedents could fairly require repudiation of the modern rationality test where rights settled by final judgments are present.

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[24] Statements that respondents may rely on can be found, for example, in *Pennsylvania v. Wheeling & Belmont Bridge Co., supra, The Clinton Bridge, supra,* and *Hodges v. Snyder, supra,* but each of those decisions *upheld* laws that disturbed (prospective) final judgments.

As for *McCullough*, the relevant passage (172 U.S. at 122-23) neither mentions due process nor actually rules on the constitutional validity of the statute allegedly disturbing a final judgment, but leads only to the conclusion that the challenged statute did not in fact have that effect. Moreover, before that passage, the Court had already disposed of this threshold question of state law, noting that the state supreme court had *not* read the statute to apply to the judgment before it. Finally, and in any event, the statute at issue was indisputably passed while the case was *pending* (on appeal in the state courts). *McCullough*'s opaque passage, *dictum* in several ways and perhaps not even meant as a constitutional conclusion, can hardly settle the question here.

[25] *See, e.g., Forbes Pioneer Boat Line v. Board of Comm'rs*, 258 U.S. 338, 340 (1922); *Stewart v. Keyes, supra; Coombes v. Getz*, 285 U.S. 434, 442 (1932); *Ettor v. City of Tacoma*, 228 U.S. 148, 156 (1913).

C. A Recent Judgment for a Defendant on Limitations Grounds Generates No Vested Right to Avoid Answering Substantive Charges Under a New Limitations Rule.

Even if this Court were to conclude that *some* types of judgments warrant special due process protection, the particular type of judgment at issue here is the very last sort that deserves special protection as a "vested right" against legislation like Section 27A(b). First, the affected judgments, aside from being quite recent, neither confirmed title to some specific property nor awarded money. Instead, their only concrete effect was to give the defendants a future protection against having to answer securities-fraud charges under 10b-5. Thus, Section 27A(b) takes away no concrete "property" awarded by a judgment. *See Paramino Lumber Co., supra* (upholding statute reopening a specific damages dispute between private parties after a final adjudication for defendant by an administrative tribunal).[26] *See also* note 5, *supra* (takings clause).

Second, and more narrowly, Section 27A(b) upsets no interest of defendants in the resolution of a specific issue previously decided by the court—any more than does Section 27A(a). The statute changes the law on the sole issue previously decided, making the prior determination immaterial. In substance, Section 27A(b) does nothing other than provide the affected plaintiffs with a new claim —for securities fraud with a new limitations period. No due process fairness notion creates a "vested" right to immunity from having to answer the altered claim, which in its current form was not, and could not have been,

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[26] The reopened judgment in *Paramino* was by law deemed "final" when no judicial review was sought (33 U.S.C. § 921), was subsequently cited by this Court as a final judgment (*Fleming v. Rhodes*, 331 U.S. at 107 n.12), and would, at least today, have had the preclusive effect of a final judgment (*see University of Tennessee v. Elliott*, 478 U.S. 788 (1986); *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966)). For due process purposes, then, the upset judgment in *Paramino* is indistinguishable from the judgments at issue here.

litigated in the original action. *Cf. Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948) (collateral estoppel "is not meant to create vested rights in decisions that have become obsolete or erroneous with time"). And no due process protection for settled expectations could reasonably elevate form over substance to distinguish Section 27A from a law using the label of "new cause of action."

Third, and of course most narrowly, the issue on which the affected judgments rest is a statute of limitations—where, indeed, it was the old rather than new limitations rule that upset litigants' expectations. *Plaut*, 1 F.3d at 1498. This Court has often noted the distinctively weak character of claims assertedly "vested" as a result of a procedural or administrative defect, including timeliness bars. *See, e.g., Paramino Lumber Co.*, 309 U.S. at 378; *Graham & Foster*, 282 U.S. at 427, 429-30. The reasons are simple. Disturbing a "repose" that rests on limitations grounds does not make unlawful any conduct that was lawful at the time. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring) (classically retroactive law "alter[s] the *past* legal consequences of *past* actions").[27] And, as the Court observed in *Chase Sec. Corp.*, 325 U.S. at 316, the law need not indulge any assumption that the affected defendants' "conduct would have been different if the present

[27] Historically, statutes of limitations have been treated as "procedural" for choice-of-law and other purposes. *See Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988); *Bournias v. Atlantic Maritime Co., Ltd.*, 220 F.2d 152 (2d Cir. 1955); Restatement (Second) of Conflict of Laws §§ 142, 143 (1971). One consequence has been that there is no guarantee of freedom from having to answer the substance of a claim, or freedom from liability, based on a dismissal for untimeliness of the suit, because the same claim might be permitted in another jurisdiction. 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.409[6], at III-162 (2d ed. 1993); Restatement (Second) of Conflict of Laws §§ 142, 143; Restatement (Second) of Judgments § 19 Comment f.

See also Block v. North Dakota, 461 U.S. 273, 291-92 (1983) (limitations bar does not determine underlying title to real property, even after final judgment).

rule had been known and the change [made by Section 27A(b)] foreseen."

Because statutes of limitations "represent expedients, rather than principles" (*Chase*, 325 U.S. at 314), "it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment." *Id.* at 316; *see Electrical Workers Local 790, supra.*[28] There is simply no good reason for a different conclusion for those plaintiffs who had the lapse of time adjudicated against them before the legislature lengthened the period. There is still less reason for a different result where, as here, the superceded claim-barring limitations rule was itself the result of an unexpected judicial decision and the curative statute merely restored all parties to their original expectations. Section 27A(b), as such a statute, should be upheld.

[28] The Court in *Campbell v. Holt*, 115 U.S. at 628, specifically rejected the notion that "a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case. The statutes of limitation, as often asserted, and especially by this court, are founded in public needs and public policy—are arbitrary enactments by the law-making power. . . . No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

ED PLAUT, ET AL.,
Petitioners,

vs.

SPENDTHRIFT FARM, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

MOTION AND BRIEF AMICUS CURIAE OF MICHAEL B. DASHJIAN IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.4 of the Rules of this Court, MICHAEL B. DASHJIAN, a member of the Bar, respectfully moves this Honorable Court for permission to file a brief *amicus curiae* in the above-captioned action, on his own behalf. The proposed brief *amicus curiae* is printed with and follows this motion.

In support of this motion, applicant states the following:

1. This brief is proffered to the Court in order to bring relevant matter to its attention that has not been and apparently will not be brought to its attention by the parties, or by other *amici*.

2. Applicant is a private practitioner in Northern California, exclusively in the area of appeals and appellate-related matters. He has prior tenure as a Senior Attorney in the Division of Enforcement of the Securities and Exchange Commission in Washington, and also has previously represented major securities clients.

3. Applicant has substantial expertise in the particular area of securities statutes of limitation, from his securities law experience and from a detailed law review article dealing with the Lampf case and section 27A of the Exchange Act. Dashjian, "The Prospective Application of Judicial Legislation," 24 Pac. L.J. 317 (1993) [lead article].

4. Many of the points in the brief are adapted from applicant's article, although they have been rewritten to address concisely specific issues raised by this case and the grant of certiorari. Other parts of the brief have been newly written solely for this case, based on applicant's significant background in the area and in separation of powers issues.

5. Applicant seeks to file this brief purely as a friend of the Court and not on behalf of any institutional interests. Because of his unusually extensive work and expertise in the area, applicant is in a particularly good position to provide the Court with relevant matter that would not otherwise be brought to its attention.

6. In order to ensure that this brief conforms with Rule 37.1 of this Court, applicant has reviewed the briefs filed by counsel for the respondents and the United States in Morgan Stanley & Co. v. Pacific Mutual Life Ins. Co., No. 93-609 (U.S. May 23, 1994), both of whom will apparently be filing briefs in support of the petitioners here as well. The main points herein were not made in those briefs, and the analyses are substantially different (although the final conclusions of constitutionality are

obviously the same). Furthermore, the main points and analyses of *amicus curiae* were not addressed in the opinion of the Sixth Circuit in this case.

7. In particular, the points made by applicant are distinct and unique in the following manner:

a. The separation of powers argument in Part II proposes a single, simple approach, without need for exceptions, that would harmonize 200 years of separation of powers jurisprudence. No brief in this case or in Morgan Stanley (and no commentator, to applicant's knowledge) has articulated it. It is derived in part from a note by Hart & Wechsler on United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

In the view of applicant, this analysis is important and merits this Court's consideration. Applicant argues that the Court of Appeals' opinion is inconsistent with other constitutional powers, such as the Presidential pardon power, and is inconsistent with this Court's separation of powers jurisprudence. Applicant's argument is based on interlinked principles from this Court's opinion in United States v. Klein, and Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792). It draws on this Court's recent decision in Robertson v. Seattle Audobon Society, ___ U.S. ___, 112 S.Ct. 1407 (U.S. March 25, 1992), which is said to illustrate applicant's approach in a different factual context. It also discusses how this Court's decision in United States v. Sioux Nation, 448 U.S. 371 (1980), and other cases cited by the Court of Appeals, fit well into the analysis espoused in this brief.

b. The due process analysis in Part III is derived from applicant's law review article. The issue raised, that there is no constitutional infirmity with Section 27A(b) because the District Court's original Lampf dismissal denied the shareholders due process of law by arbitrarily depriving them of a hearing on their claims, was not addressed by the Court of Appeals' opinion in this case or by any party.

c. The analyses in Part I(B), made to show that section 27A(b) does not interfere with "vested rights," are also derived from applicant's law review article and are very different from the arguments made on behalf of the respondents in Morgan Stanley. Applicant argues that the running of the Lampf limitations period conferred no "vested rights" because there was no legislative intent that it do so, and the District Court's judgment based on Lampf also conferred no "vested rights" because it did not adjudicate the merits of any claim and had no *res judicata* effect. These analyses have not been proffered by any party and were not addressed by the Court of Appeals' opinion.

d. Pages 1 and 2 of Part I(A), part of the discussion of why section 27A(b) has a rational basis, do overlap briefly with the briefs on behalf of respondents in *Morgan Stanley*. The remainder of Part I(A), centering around the principle that Congress can "overrule" decisions of this Court in the field of statutory interpretation, makes a point that has not been made by any party. The argument in this Part is also part of foundation for the separation of powers analysis in Part II.

8. Based on the above, applicant believes this brief does bring relevant matter to the attention of this Court which would not otherwise be brought to its attention by the parties. Applicant believes the analyses herein would be of substantial benefit to the Court in resolving the important issues raised in this case.

9. Applicant files this motion because not all parties to the case have consented to the filing of this brief.

The following parties have consented: Intervenor - United States of America; Respondents - Spendthrift Farm; Gibson, Dunn & Crutcher/Francis Wheat(*); Deloitte & Touche.

The following parties have declined consent: Petitioner - Plaut et al.; Respondents - Bateman Eichler; Norman Owens/American Int'l Bloodstock Agency(*).

[(*) refers to parties jointly represented by the same counsel.]

For the foregoing reasons, applicant respectfully asks that his motion to file a brief *amicus curiae* be granted.

I declare under penalty of perjury of the laws of the United States that the facts set forth herein are true and accurate to the best of my personal knowledge.

Dated this 20th day of July, 1994.

Respectfully submitted,

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No. 93-1121

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

ED PLAUT, ET AL.,
Petitioners,

vs.

SPENDTHRIFT FARM, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF MICHAEL B. DASHJIAN IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

Amicus curiae practices privately in Northern California, exclusively in the area of appeals and appellate-related matters. He has a significant background in securities litigation, including prior representation of major securities clients and tenure as a Senior Attorney in the Division of Enforcement of the Securities and Exchange Commission in Washington. He has substantial expertise in the area of securities statutes of limitation, culminating in a detailed 1992 article dealing with Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, ___ U.S. ___, 111 S.Ct. 2773, 115 L.Ed.2d 321 (U.S. June 20, 1991), and section 27A of the Exchange Act. Dashjian, "The Prospective Application of Judicial Legislation," 24 Pac. L.J. 317 (1993) (hereinafter "Prospective Application").

This brief is adapted in part from "Prospective Application." While many of the views of *amicus curiae* are set forth in the article, this brief should obviate the need to dissect an 80-page article with a frequently theoretical focus for the portions most applicable to this case. In addition, other portions of this brief have been newly written for the case now before this Court. The portions of "Prospective Application" that have been adapted for this brief have also been further refined or rewritten, based on the Court of Appeals' opinion and this Court's grant of certiorari.

This brief is being filed by *amicus curiae* purely as a friend of the Court. Because of his unusually extensive work and expertise in the area, *amicus curiae* is in a particularly good position to provide the Court with relevant matter that would not otherwise be brought to its attention.

SUMMARY OF ARGUMENT

Section 27A(b) does not violate the Due Process Clause of the Fifth Amendment. Rationally based retrospective legislation is permissible, and this legislation was rationally based in Congress's desire to "overrule" the perceived unfairness of retroactive application of Lampf. Section 27A(b) also does not interfere with "vested rights." A litigant does not obtain a "vested right" in the running of an ordinary limitations period such as that created in Lampf. Furthermore, there is no "vested right" in a judgment which is not rendered on the merits and has no *res judicata* effect, such as the District Court's original judgment on limitations grounds.

Section 27A(b) does not violate the separation of powers. Two centuries of separation of powers jurisprudence may be reconciled in simple principles of universal applicability: Congress can exercise the legislative

power; it cannot exercise the judicial power; and its legislation cannot be independently unconstitutional on other grounds. The Court of Appeals and the respondents have erroneously equated a federal court judgment with the "practical effect" of a federal court judgment. Congress cannot legislate to modify or review a judgment, because that would be an exercise of the Article III "judicial power" which rests solely in the federal courts. But Congress can change the "practical effect" of a judgment—change rights and obligations decreed by the judgment—provided the judgment remains intact, and Congress's action is not "independently unconstitutional on other grounds." That is what Congress did in passing section 27A(b).

Finally, section 27A(b) violates no constitutional provision because the District Court's original judgment itself was a deprivation of due process, based on prior holdings of this Court. This Court has never addressed squarely whether retroactive application of the Lampf time bar would violate the Due Process Clause. It should do so here, either to avoid reaching an issue of the constitutionality of an Act of Congress, or to hold section 27A(b) constitutional on both grounds in the grant of certiorari.

ARGUMENT

I. Section 27A(b) Does Not Violate The Due Process Clause Of The Fifth Amendment To The U.S. Constitution

A. The Statute Is Rationally Based

Section 27A(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa-1, comports with substantive principles of due process of law requiring that governmental action be nonarbitrary and rationally based.

Every court that had addressed the issue had held this Court's decision in James B. Beam Distilling Co. v. Georgia, ___ U.S. ___, 111 S.Ct. 2439, 115 L.Ed.2d 481 (U.S. June 20, 1991), required retroactive application of Lampf's new limitations period, even if that barred claims which were timely when filed. See "Prospective Application," 24 Pac. L.J. at 345-346 & n. 162, and cases cited. Congress apparently agreed. See 137 Cong. Rec. H11811 (daily ed. Nov. 26, 1991) (letter of Rep. Dingell.) This concerned Congress, largely because actions against prominent people linked to the savings and loan crisis could have been subject to dismissal under the new Lampf rule. Id. S13707 (daily ed. Nov. 21, 1991) (statement of Sen. Riegle). The FDIC was also concerned that cases against alleged wrongdoers in the S & L scandals would be jeopardized. Id. S18625 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan).

Congress's solution was, in effect, to allow this Court's one and three-year limitations period to stand, but to overrule the perceived retroactive application of Lampf. 137 Cong. Rec. S17356 (daily ed. Nov. 21, 1991) (statement of Sen. Domenici); id. S17306 (daily ed. Nov. 21, 1991) (statement of Sen. Riegle); id. H11811-12 (daily ed. Nov. 26, 1991) (letter of Rep. Dingell); id. S18624 (daily ed. Nov. 27, 1991) (statement of Sen. Bryan). There is nothing arbitrary or irrational about that.

It is true that section 27A was retroactive legislation, since it was signed in December 1991 but only applied to litigants who had claims pending before June 20, 1991. However, Congress may apply its statutes only to a particular class of litigants, and may legislate retroactively. Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729-30 (1984); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 17-18 (1976). As long as there is a rational basis for both the legislation and the manner in which it is applied, and no other constitutional infirmity, Congress may apply economic legislation as it wants. Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. at 729-30; Usery v. Turner Elkhorn Mining Co., 428 U.S. at 17-18. Here, as to actions under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), "Lampf changed the rules in the middle of the game for thousands of fraud victims who already had suits pending." 137 Cong. Rec. S18623 (Nov. 27, 1991) (statement of Sen. Bryan). This is a rational basis for changing the rules back.

It does not matter that Congress passed a statute in order to negate the perceived unfairness of decisions of this Court. Congress can "overrule," alter or modify a federal court statutory interpretation that is contrary to the will of Congress, as this Court has acknowledged. "[O]verruling or modification [of a prior Supreme Court decision interpreting a federal statute] should be left to Congress. . . . [W]hen the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time. . . ." United States v. South Buffalo Ry. Co., 333 U.S. 771, 774-75 (1948); accord, e.g., Illinois Brick Co. v. Illinois, 431 U.S. 720, 734 n.14 (1977). (For recent examples, see, e.g., Ardestani v. INS, ___ U.S. ___, 112 S.Ct. 515, 518, 116 L.Ed.2d 496 (U.S. Dec. 10, 1991); Johnson v. Home State Bank, ___ U.S. ___, 111 S.Ct. 2150, 2154 n.4, 115 L.Ed.2d 66 (U.S. June 10, 1991).) Congress is in the best position to determine its own intent, so Congress should and does have the last word if it wants it.

Lampf, read in conjunction with Beam, generally has been interpreted to have two elements: (1) a determination of what statute of

limitations would be applied in section 10(b) cases, and (2) a determination that this statute of limitations would be applied retroactively. The Congressional response, section 27A, acquiesced in the limitations period, but nullified the retroactive effect. This was a rational response based on a policy determination that even if this Court did not necessarily contravene Congressional will in implementing the new limitations period, it did so in making that limitations period retroactive. Congress could rationally determine that parties should not have their federal antifraud claims eliminated on technical grounds through no action or inaction of their own.

Section 27A was also consistent with Congress's long-standing policy for new statutes of limitation, including ones in economic legislation. That policy has been to implement new statutes of limitation prospectively. E.g., Act July 7, 1955 section 4, 69 Stat. 283 (new four-year Clayton Act period effective six months after enactment); 7 U.S.C. § 25(d), P.L. 97-444, 96 Stat. 2322 (new limitations period for Commodity Exchange Act actions not to affect causes of action accruing prior to statute's enactment). This is also a policy that has been imposed on Congress by this Court. See Sohn v. Waterson, 84 U.S. (17 Wall.) 596, 598-99 (1873); Union Pacific Ry. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 202 (1913).

Congress's most recent declaration of this policy was contemporaneous with Lampf itself. When Congress enacted a catch-all four-year statute of limitations in December 1990, it made the limitations period prospective by applying it only to actions created after that date. 28 U.S.C. § 1658, P.L. 101-650, § 313(a). Congress viewed settling the expectations of parties as an essential purpose of a statute of limitations, and it did not want to impose a new limitations period retroactively because that might disrupt settled expectations. See H.R. Rep. No. 101-734, 101st Cong., 2d Sess., at 24, *reprinted in* 1990 U.S.C.C.A.N. 6802, 6870.

Thus, section 27A was based on rational policy that new limitations periods should not be applied retroactively, and that to so apply the Lampf would be unfair. This was an appropriate exercise of Congressional power.

B. The Statute Does Not Unconstitutionally Impair Private Property Rights

The portion of section 27A(b) which allows the revival of claims previously dismissed as time-barred does not impair "vested rights."

Preliminarily, the issue in this section should be addressed with precision. The United States, writing in Morgan Stanley & Co. v. Pacific

Mutual Life Ins. Co., No. 93-609 (U.S. May 23, 1994), questioned the use of the term "vested right," arguing that there is no such term in the Constitution. This argument is also supported by a decision of this Court:

> It is to be observed that the words "vested right" are nowhere used in the Constitution, neither in the original instrument nor in any of the amendments to it. We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the constitution.

Campbell v. Holt, 115 U.S. 620, 628 (1885).

It would thus be more precise for respondents to claim that a judgment on limitations grounds is constitutionally protected private property, and section 27A(b) violated the constitutional protection. And since the grant of certiorari extends only to whether section 27A(b) violates the Due Process Clause or the separation of powers, the only "vested rights" claim which could be made here would be that section 27A acted to take private property without due process of law.

Nonetheless, the term "vested rights" could be used as a shorthand for "constitutionally protected private property rights," and it appears this is what the Court of Appeals and the District Court meant by the term. Therefore, for the sake of simplicity and consistency, *amicus curiae* will use the term "vested rights" or "vested property rights" to refer to private property rights protected by the Fifth Amendment's Due Process Clause.

A "vested rights" argument could have merit in other situations involving the reopening of final judgments. If a private individual were paid a money judgment from an action in an Article III court, it is doubtful Congress could act to subject the judgment to relitigation. In such a case, the judgment may be a vested property right, which Congress cannot take away by legislation. See, e.g., Asiatic Petroleum Co. v. Insular Collector of Customs, 297 U.S. 666, 671 (1936); McCullough v. Virginia, 172 U.S. 102, 123 (1898). However, no vested rights are implicated in this case.

There are two possible "vested right" arguments which could be addressed to this case; one, that the mere running of the limitations period imposed by Lampf created a "vested right"; and two, that the District

Court's original judgment dismissing the shareholders' action on limitations grounds created a "vested right." They will be taken in turn.

1. The Running Of The *Lampf* Limitations Period Created No "Vested Rights"

Litigants objecting to "retroactive" limitations periods have sometimes asserted that the mere *running* of a statute of limitations creates "vested rights," and therefore that a Legislature may not constitutionally reinstate an action as to which a limitations period has already run.

Such claims, however, have been repeatedly rejected by this Court. Int'l Brotherhood of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc., 429 U.S. 229, 243-44 (1976); Chase Securities Corp. v. Donaldson, 325 U.S. 304, 315-16 (1945); Campbell v. Holt, 115 U.S. 620 (1885). These decisions refute any claim that respondents obtained "vested rights" from the mere running of the time period set forth by Lampf.[1]

In Chase Securities Corp. v. Donaldson, 328 U.S. at 312 n.8, and Int'l Brotherhood of Electrical Workers v. Robbins & Myers, 429 U.S. at 233, the defendants sought to use this Court's decision in William Danzer Co. v. Gulf & Ship Island Ry. Co., 268 U.S. 633 (1925), to claim Congress has no power to revive an action that was time-barred when filed. Danzer is no more applicable here than it was in Chase Securities and Robbins & Myers, since the limitations period in Lampf is not of the type in Danzer.

Danzer's limitations period was the less common one that extinguishes a liability when it runs, rather than merely denying a party his remedy. Danzer, 268 U.S. at 636; see, e.g., 1B J. Moore, Moore's Federal Practice, ¶ 0.409[6] at 334-35 (3d ed. 1988); Midstate Horticultural Co. v. Pennsylvania Ry. Co., 320 U.S. 356, 358-59 & n.4 (1943).[2]

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[1] A statute of limitations is generally an affirmative defense of a procedural bar that may be waived. See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 332 (1971); Helvering v. Newport Co., 291 U.S. 485, 488 (1943); Fed. R. Civ. P. 8(c).

[2] This type of limitations period is commonly found in actions over property, because of the importance of settling questions of title. Campbell v. Holt, 115 U.S. at 623-24. It is also found in suits against the Government, see, e.g., Becker Steel Co. v. Cummings, 296 U.S. 74, 84 (1935), since the Government cannot be sued without its specific consent, and a condition accompanying consent (such as a statute of limitations) must be strictly complied with. Soriano v. United States, 352 U.S. 270, 276 (1957).

It is true that if this type of time bar has run, retroactive application of a new limitations period may amount to a taking of property. This was the precise holding of Danzer, 268 U.S. at 636-37. The Danzer limitations period is one which either (a) is attached to a liability and specifically creates a finite term of its existence, or (b) is directed specifically to the liability, so as to warrant a conclusion that the statute qualifies the right. Chase Securities Corp. v. Donaldson, 325 U.S. at 312 n.8.

The Danzer principle, however, is based solely on legislative intent that the right is unenforceable after a specific time. The fact that a statute of limitations is part of the same Act as an underlying liability does not automatically make it a Danzer-type limitations period. Int'l Brotherhood of Electrical Workers v. Robbins & Myers, Inc., 429 U.S. at 243; Burnett v. New York Central Ry. Co., 380 U.S. 424, 427 n.2 (1965); Midstate Horticultural Co. v. Pennsylvania Ry. Co., 320 U.S. at 360. Danzer also does not automatically apply merely because the time bar in question is a nontollable "repose period," after which no action can be brought under any circumstances. See generally Int'l Brotherhood of Electrical Workers v. Robbins & Myers, Inc., 429 U.S. 229 (1976) (rejecting Danzer analysis).

Since Danzer can only be invoked when there is a clear legislative intent to extinguish a right after a certain time, it cannot be invoked here. There is no legislative intent that the rights underlying the section 10(b) cause of action be extinguished after the running of Lampf's outer three-year bar. There is no legislative intent at all in this case, because neither the section 10(b) action nor its new time bar were created by a legislature.

Furthermore, this Court recognized in Lampf that Congress's usual intent on limitations questions such as these is to borrow state law. Lampf, 111 S.Ct. at 2778. It held, however, that the section 10(b) limitations period warranted judicial "interstitial lawmaking" based on considerations of "federal policies . . . and the practicalities of litigation." Id. There is no suggestion of Congressional intent to extinguish a right Congress did not create, based on a limitations period it also did not create, which was adopted as judicial policy 45 years after the right was first recognized.

2. The District Court's Original Dismissal Of Petitioners' Action On Limitations Grounds Created No "Vested Rights"

Nor did the District Court's original judgment dismissing the shareholders' action on limitations grounds create a "vested right" which was unconstitutionally taken away by section 27A(b).

Contrary to the Court of Appeals' opinion, Plaut v. Spendthrift Farm, Inc. 1 F.3d 1487, 1490 (6th Cir. 1993), there is no "vested right" in a judgment alone, without an adjudication on the merits.

Absent a statute or rule to the contrary, a judgment not on the merits is not an actual determination of a claim. Such a judgment is only a refusal to hear the claim, and thus may not bar subsequent actions. 1B J. Moore, Moore's Federal Practice (3d ed. 1988), ¶¶ 0.405[5] at 228, 0.409[1.-2] at 308, 0.409[6] at 338-39; Costello v. United States, 365 U.S. 265, 285-86 (1969) (want of prosecution); St. Romes v. Levee Steam Cotton-Press Co., 127 U.S. 614, 618-19 (1888) (want of indispensable parties); House v. Mullen, 89 U.S. (22 Wall.) 42, 46 (1874) (misjoinder); Miller v. United States Postal Service, 729 F.2d 1033 (5th Cir. 1984) (want of jurisdiction); see generally Hughes v. United States, 71 U.S. (4 Wall.) 232, 237 (1866). This rule has been used for dismissals on limitations grounds. Henson v. Columbus Bank & Trust Co., 651 F.2d 320, 325 (5th Cir. 1981); Jimenez v. Toledo, 576 F.2d 402, 404 (1st Cir. 1979); Warner v. Buffalo Drydock Co., 67 F.2d 540, 541-42 (2d Cir. 1933), cert. denied, 291 U.S. 678 (1934); Restatement (2d) Judgments § 19 comment f and Reporter's Notes; Restatement (2d) Conflict of Laws § 110 comments a, b.

Since subsequent actions may not be barred, there can be no "vested property right" in the original judgment not going to the merits.

The cases above are cases dealing with *res judicata*, but they demonstrate the point here, for the law of *res judicata* would be radically different than it always has been if respondents' argument were correct. Under respondents' apparent view, any judgment on any ground—even if not on the merits—supposedly creates "vested rights."

This view would lead to the conclusion that a second lawsuit can never be permitted to overcome the dismissal of an earlier lawsuit, because that would nullify the effect of the "vested rights" supposedly obtained through the final judgment dismissing the first lawsuit. In other words, all defendants in that situation would have a "vested right" in blocking adjudication of the plaintiff's underlying right, an absolute immunity from suit. All plaintiffs would be forever prohibited from pursuing their claims.

That is not the law. *Res judicata* has not barred subsequent actions following judgments that are not on the merits, even at common law. Haldeman v. United States, 91 U.S. (1 Otto) 584, 586 (1876). If an action is dismissed for failure to pay a filing fee, no one would question the defendant does not acquire absolute immunity, and the plaintiff can refile.

If an action is dismissed because it was filed in the wrong court, no constitutional rights are violated if the plaintiff refiles in the right one. Many states have "saving statutes" which authorize this type of result. See, e.g., Burnett v. New York Central Ry. Co., 380 U.S. at 431-32; Dunton v. County of Suffolk, 729 F.2d 903, 911 n.8 (2d Cir. 1984). Of necessity, such judgments by themselves create no property rights."[3]

Thus, the only way a judgment based on a statute of limitations could arguably create "vested rights" would be if it were a judgment on the merits. Here, the District Court's original judgment was not on the merits. As is discussed in Part I(B)(1) above, a statute of limitations is a mere procedural restriction, and a judgment based on a plea of limitations operates only to bar the remedy and does not extinguish the underlying right. Campbell v. Holt, 115 U.S. at 624-25, 628-29; see Sun Oil Co. v. Wortman, 488 U.S. 717, 725-26, 728-29 (1988). The argument that the Lampf statute of limitations extinguished the underlying right in this case was addressed in Part I(B)(1) above; suffice it to say it did not.

A *res judicata* analysis also highlights further the errors below. The Court of Appeals wrote: "[T]he very existence of this appeal suggests that

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[3] Federal Rule of Civil Procedure 41(a) further demonstrates this proposition. Rule 41(a), promulgated under the Rules Enabling Act, 28 U.S.C. § 2072, provides a plaintiff may file a voluntary dismissal without prejudice at any time before the defendant serves an answer or a motion for summary judgment. This permits the plaintiff to "reopen" the judgment of dismissal simply by filing another action, which would also militate against any argument that the first judgment created "vested rights" in favor of the defendant.

The Rules Enabling Act is part of the "long-recognized power of Congress to prescribe housekeeping rules for federal courts." Hanna v. Plumer, 380 U.S. 460, 473 (1965). Accordingly, "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself." Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825). Conversely, Congress has no authority to delegate powers that it cannot exercise itself. Since Congress has delegated powers resulting in the implementation of Rule 41(a), it must be able to exercise those powers itself. As a result, Congress must have every power to pass a statute allowing actions to be reopened in the same manner that Rule 41(a) permits, pursuant to the Congressional delegation in the Rules Enabling Act.

The Government made a similar argument below, based on Fed. R. Civ. P. 60(b). The Court of Appeals rejected it and distinguished Rule 60(b) by saying. "The question is not whether the courts may disturb final judgments, but whether Congress may disturb them. Plaut v. Spendthrift Farm, 1 F.3d at 1493 n.13 (emphasis in original). However, the proper analysis as to Rule 60(b) is the same as that above. Rule 60(b) exists by virtue of the Rules Enabling Act, and it too is part of Congress's power to prescribe housekeeping rules for the federal courts. The distinction drawn by the Court of Appeals is thus illusory.

defendants have not chosen to waive their defenses of res judicata with which the District Court vested them in dismissing the shareholders' claim as time barred." Plaut, 1 F.3d at 1498. The Court of Appeals apparently thought respondent's "vested right" was a *res judicata* defense in favor of the District Court's original judgment. That was in error, because as this section shows, the District Court's dismissal on limitations grounds did not adjudicate the merits.[4]

The principles discussed in this section are exemplified by Brent v. Bank of Washington, 35 U.S. (10 Pet.) 596 (1836). In Brent, the Bank had filed an untimely action on the decedent Brent's notes, and judgment was entered for Brent's executors based on the statute of limitations. Later, the executors, who held stock of the Bank, brought a bill in equity to transfer that stock to pay Brent's debts to the United States. According to the legally enforceable rules of the Bank, however, transfer of its stock was contingent on payment first of all outstanding debts to the Bank.

This Court held that although the Bank's action at law on the notes had been barred by a limitations judgment, the Bank still retained an equitable lien on the stock and could prevent the stock's transfer until all debts due the Bank were paid. It based its holding on the principle above, that the judgment based on the statute of limitations barred the Bank's remedy at law, but the debt remained as an unextinguished right which could still underlie property rights such as an equitable lien. Id. at 617-18.

This Court's holding in Brent would have been impossible if the original judgment on limitations grounds had created a "vested right," extinguishing Brent's debts and forever immunizing Brent's executors from any effort by the Bank to collect them. As the opinion makes clear, the original judgment had no such effect. It has no such effect here either.

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[4] Also illustrative of these principles is Freeborn v. Smith, 69 U.S. (2 Wall.) 160, 175 (1865):

> [I]t is hard to perceive what vested right the defendant in error had in having this case suspended between two tribunals, neither of which could take jurisdiction of it; or the value of such a right, if he was vested with it. If either party could be said to have a vested right, it was plaintiff in error . . . If the judgment below was erroneous, the plaintiff in error had a moral right at least to have it set aside, and the defendant is only claiming a vested right in a wrong judgment. "The truth is . . . there is no such thing as a vested right to do wrong . . . ."

In short, a judgment, without more, creates no "vested rights." There is no more in this case, however. The Court of Appeals' holding that the dismissal of the shareholders' claim on limitations grounds forever fixed the rights of the parties, Plaut v. Spendthrift Farm, 1 F.3d at 1498, is based on a faulty premise, that a limitations dismissal permanently fixes any rights at all. Like other procedural bars, it is a refusal to hear a claim, which may and usually does prevent assertion of that claim. However, a mere procedural refusal to hear a claim does not preclude an appropriate act that would permit the claim to be renewed or heard on the merits.

II. Section 27A(b) Does Not Violate The Separation Of Powers

Congress does not violate the separation of powers when it passes legislation authorizing the reinstatement of previously dismissed claims in a federal court, provided (1) it does not purport to modify or review the federal court's actual judgment; and (2) its action is not independently unconstitutional on other grounds. Since neither proviso applies here, section 27A(b) violates no separation of powers principles.

The inquiry for separation of powers questions is the extent to which section 27A(b) "prevents the [judiciary] from accomplishing its constitutionally assigned functions." Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977). Section 27A(b) does not do this at all. The simple governing principles, which reconcile 200 years of separation of powers jurisprudence from 1792 to 1992, are: The Legislature can exercise the legislative power; it cannot exercise the judicial power; and its legislation cannot be independently unconstitutional on other grounds.

A. Introduction: *Hayburn's Case*

The Court of Appeals' opinion was based on an erroneous extension of Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792), far beyond the issue before the Justices who wrote on it, and far beyond the basic constitutional principles which those Justices—writing nearly contemporaneously with the ratification of the Constitution—sought to expound.

Hayburn's Case illustrates what no one would now question: Congress cannot confer jurisdiction on an Article III court so as to subject the court's judgments to nonjudicial review. Thus, in Hayburn's Case, the Justices agreed Congress could not grant jurisdiction in the federal courts while subjecting their judgments to review by the Secretary of War.

This principle was also illustrated in Gordon v. United States, 117 U.S. 697 Appx., 69 U.S. (2 Wall.) 561 (1865), in which Chief Justice Taney's opinion reiterated that a grant of "jurisdiction" was invalid when it provided a money judgment against the United States would not be paid until (and unless) an appropriation was estimated by the Secretary of the Treasury—a requirement of nonjudicial review. Other cases also illustrate the principle. In re Sanborn, 148 U.S. 222, 225-28 (1893); United States v. Ferreira, 54 U.S. (13 How.) 40, 46-47 (1851).[5]

Section 27A(b) was not a Congressional grant of jurisdiction that required nonjudicial review of judgments. When the District Court entered judgment against the shareholders in this case, section 27A did not even exist. The District Court's dismissal was no mere "recommendation"; it was a dismissal, legally binding on the parties to the litigation.

The principles of Hayburn's Case are not necessarily limited to prospective grants of jurisdiction authorizing nonjudicial review of federal court judgments. They may in some situations extend to *post hoc* legislation by Congress specifically authorizing review of a prior federal court judgment by a nonjudicial branch. In Hayburn's Case, the jurists in the Circuit Court for the District of New York (Chief Justice Jay, Justice Cushing and District Judge Duane) wrote: "[B]y the constitution, neither the secretary at war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court." 2 U.S. at 414 n.*. If a District Court renders judgment that A is entitled to a certain payment from B, Congress cannot

[5] Many other Article III principles also emanate from Hayburn's Case, such as the prohibition against advisory opinions, the adverseness requirement, and others. The relationship of these principles to the separation of powers is beyond cavil, since all stem from the division of the branches under Articles I, II and III. Thus, for example, it might be said an Article III judgment is not subject to nonjudicial review because that would render it an advisory opinion. This discussion fairly encompasses all such related Article III principle; it is unnecessary to repeat it for all of them.

As it turned out, Hayburn's Case would not have involved a justiciable "case or controversy" even if the judgments of the federal courts had been final. United States v. Todd, summarized at 54 U.S. (13 How.) 40, 53 (U.S. 1794). That facet of the case is not relevant to this discussion.

then pass a special act permitting itself or the Executive to reexamine and readjudicate this judgment, and deeming the judgment null and void.[6]

A third important and related separation of powers principle arises out of this Court's decision in United States v. Klein, 80 U.S. (13 Wall.) 128 (1872). While Klein has in the past been controversial and often misinterpreted, on its face it fits neatly into the constitutional scheme of separation of powers and provides an essential adjunct to Hayburn's Case.[7]

The essence of Klein relevant to this discussion is that Congress is prohibited from exercising the "judicial power" in Article III "cases and controversies," or from impairing the judiciary's ability to exercise that power, which is the judiciary's exclusive constitutional function.

There were many ways Congress did this in Klein. For one, Congress impaired this Court's ability to interpret the Constitution, its paramount role in our tripartite system. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803). Based on its interpretation of Article II, this Court had already held the President had sole and absolute pardon power, and a claimant could rely on a pardon to prove loyalty. United States v. Padelford, 76 U.S. (9 Wall.) 531, 542-543 (1870) (citing Ex Parte Garland, 71 U.S. (4 Wall.) 333, 380 (1867) and Armstrong's Foundry, 73 U.S. (6 Wall.) 766, 769 (1868)). Congress's Act nullified this Court's interpretation

[6] The word "opinions" in the passage above from Hayburn's Case cannot be interpreted over-literally and out of context, to mean that Congress cannot pass an Act disagreeing with an opinion of a federal court. As has already been discussed above, ante Part I(A), Congress may pass a statute to correct an erroneous federal court interpretation of a prior statute. The passage above should be viewed in the context in which it was written; an "opinion" of the court referred to its final decision, a judicial decree.

[7] The Court of Appeals held there were no issues in this case arising from Klein. Plaut, 1 F.3d at 1497 n.14. In a narrow and technical sense, the Court of Appeals was correct; this case presents different facts from those in Klein, since section 27A(b) by its terms did not affect any pending case or controversy. However, as will be shown herein, Klein and this Court's most recent case respecting it, Robertson v. Seattle Audobon Society, ___ U.S. ___, 112 S.Ct. 1407, 118 L.Ed.2d 73 (U.S. March 25, 1992), provide very important guidance for resolving the issues in this Part. In many respects, this case follows directly from Robertson, since respondents' argument is essentially the same as that of the respondents in Robertson—with the exception that the respondents in Robertson were citing Klein based on the facts of that case, while respondents here have foregone Klein and are instead citing Hayburn's Case. See post, Part II(B)(2). As will be shown in this Part, for separation of powers purposes, Klein and Hayburn's Case stand for the same principles.

of Article II and its ability to apply that interpretation to Klein's case, which Congress cannot do. See United States v. Klein, 80 U.S. at 145.

Furthermore, by its Act, Congress participated in the exercise of the "judicial power" in a "case or controversy" and in fact directed how Klein's case was to be decided, which are also beyond the power of Congress. Congress made itself the ultimate adjudicator, and the judiciary was used for purposes other than exercising the judicial power to render a final decree, which is impermissible under Article III. See id., 80 U.S. at 146-47; United States v. Sioux Nation of Indians, 448 U.S. 371, 405 (1980).[8]

Hayburn's Case makes clear a nonjudicial branch cannot participate in any exercise of Article III "judicial power." There, the prohibited participation in the "judicial power" was Executive review of judgments. Similarly in Klein, this Court held Congress could not participate in an exercise of Article III "judicial power" in the adjudication of Klein's case.

Thus, the separation of powers doctrine of Hayburn's Case encompasses three propositions relevant here: (1) Congress cannot grant jurisdiction so as to subject judgments of a federal court to nonjudicial review; (2) Congress cannot subject a judgment of a federal court to

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[8] This Court was certainly correct in holding that Congress directed how Klein's case and others were to be decided. The Court's obvious concern was that if in the exercise of its Article III judicial power, it applied the facts to the law and decided the claimant should prevail—which it obviously would have, based on Padelford—the Act then required it to dismiss the cause for want of jurisdiction. This in effect substituted Congress's will for this Court's judgment in an ongoing case or controversy, which is unconstitutional. See Klein, 80 U.S. at 146-47; United States v. Sioux Nation, 448 U.S. at 405.

More generally, if in any case subject to this Act of Congress, a federal court were to have relied on a pardon as the basis for a pardoned claimant's assertion of loyalty, then it was required to dismiss the claimant's case for want of jurisdiction. If it did not rely on the pardon, then the pardon was conclusive evidence of the claimant's disloyalty, and no judgment could be rendered for the claimant. In either case, the claimant lost. When Congress tells a federal court to decide a case by the law, "Heads we win, tails everyone else loses," it deprives the judiciary of the "judicial power," and simply arrogates to itself the power to make the relevant decision. See also Manley v. Georgia, 279 U.S. 1, 6 (1929).

In Klein's case, Congress not only took the power to make the decision from the federal courts, but the decision it made was independently unconstitutional on other grounds. Based on this Court's prior cases interpreting Article II, the Executive had the sole constitutional pardon power. However, the Act of Congress presumed to dictate the effect of a pardon and impair the Executive's sole discretion, which Congress could not do.

nonjudicial review after the fact; and (3) Congress cannot participate in the "judicial power" as to a "case or controversy," or impair the federal courts' ability to exercise the "judicial power" as to a "case or controversy."

These three propositions, put together, stand for one fundamental tenet: The judiciary exercises the whole Article III "judicial power" over "cases and controversies," and a nonjudicial branch can exercise no such "judicial power." In turn, the constitutional terms "judicial power" and "case or controversy" have been defined by this Court: "By those terms are intended the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case or controversy." Smith v. Adams, 130 U.S. 167, 173-74 (1889) (citing Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 819 (1824)).

However, it is Congress's prescribed function to legislate. U.S. Const., Art. I, § 1. Congress may change substantive law and create jurisdiction in the federal courts. As long as it does not do any of the things prohibited above, Congress can change substantive law or create jurisdiction in any way, if its action is not otherwise unconstitutional.

Congress can also change the law or create new law applicable to a case—even a pending case—and that change in law may well have a significant practical effect on a court's adjudication. See, e.g., Robertson v. Seattle Audobon Society, ___ U.S. ___, 112 S.Ct. 1407, 1413-14, 118 L.Ed.2d 73 (U.S. March 25, 1992); 149 Madison Avenue Corp. v. Asselta, 331 U.S. 795 (1947). But if there is no nonjudicial review of a federal court judgment, and no other Congressional impairment of the judicial power, and the action is not "independently unconstitutional on other grounds," a change in law is permissible whatever its "practical effect."[9]

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[9] The term "independently unconstitutional on other grounds," used in this context, is borrowed from the commentary on United States v. Klein found in P. Bator, D. Shapiro, P. Mishkin & H. Wechsler, The Federal Courts and the Federal System 316 (2d ed. 1973). See also In re Consolidated United States Atmospheric Testing Litigation, 820 F.2d 982, 992 (9th Cir. 1987), cert. denied, 485 U.S. 905 (1988). The analysis herein is fully consistent with this view of Klein, and actually appears to be a restatement of the same principles, applied across a broader range of separation of powers issues than the particular ones presented in Klein. Since it is the view of *amicus curiae* that the separation of powers principles illustrated by Klein follow directly from the general separation of powers principles in Hayburn's Case, the similarity of analysis is unremarkable.

B. The Proper Application Of *Hayburn's Case* To This Case

1. Introduction; Application Of Principles In Part II(A)

As this section will further show, Congress may enact legislation and create jurisdiction, even if its action has a "practical effect" on rights and obligations originally decreed by a prior federal court judgment—so long as (1) Congress's action is not "independently unconstitutional on other grounds," and (2) the prior federal court judgment is kept intact and unchanged, and is fully respected for all legal rights and obligations (if any) it still requires. The prior federal court judgment must be fully respected, for to do otherwise would be to subject it to impermissible nonjudicial review. But Congress can take a separate action that is *not* directed at the judgment itself; there is no separation of powers prohibition against legislation that may have the "practical effect" of changing rights and obligations previously defined by a federal court judgment.

To state the conclusion first, what Congress can do is exactly what section 27A(b) did. The District Court originally held on August 13, 1991 that under the law which existed at that time, the shareholders' claims were time-barred. It entered a decree dismissing the shareholders' action. Subsequently, Congress changed the law by eliminating the retroactive effect of the new time bar, by creating a right to a new adjudication for parties who had been retroactively affected by the new time bar.

That Act of Congress involved none of the separation of powers problems set forth above. Congress did not direct that the judiciary's judgments in past, pending or future actions would be submitted to it or the SEC for approval. Nor was section 27A(b) an adjudication of this particular case or any other case. Nor did it impair the judiciary's ability to exercise the "judicial power," as defined above, in any "case or controversy." Rather, all judgments by District Courts were kept intact. Congress passed no law stating, "Prior dismissals of section 10(b) actions under the Lampf time bar are hereby rendered null and void, and the District Courts shall decide their cases as if those dismissals did not exist."

Thus, Congress merely changed the law by providing for a second action, which it was empowered to do. It did not touch the original judgments. It passed a new law with a new limitations period (namely, the limitations period in effect when Lampf was decided), and it empowered federal courts to hear claims based on this new law. This is the essence of legislative power. And as discussed in Part I above, Congress violated no other constitutional provision in so doing.

2. The Erroneous "Practical Effect" Doctrine

This section further analyzes why there is no prohibition against legislation that may change the "practical effect" of a prior federal court judgment, but does not act to review the judgment itself, and is not "independently unconstitutional on other grounds." The analysis recognizes the difference between a judgment of a federal court and the "practical effect" of judgment of a federal court. This difference has not been recognized by those who have argued against section 27A(b)'s constitutionality, and the absence of such recognition is a source of error.

The Court of Appeals' decision, and other arguments claiming a separation of powers problem with section 27A(b), are necessarily grounded on the "practical effect" doctrine no matter how they are worded. For example, while the Court of Appeals referred loosely to a prohibition against "disturb[ing] final judgments," Plaut, 1 F.3d at 1493, 1498, it is unquestionable that section 27A(b) did not purport to act on the judgment of the District Court itself. Nothing in section 27A(b) refers to any judgment of a federal court in this case, any other case, or any set of cases.

Rather, section 27A(b) only changed the "practical effect" of the judgment of the District Court—namely, a refusal to hear the merits of the shareholders' claims. Thus, if there is a separation of powers problem in this case, it would have to be because the Constitution forbids a nonjudicial branch from taking action that would change the practical effect of a prior federal court judgment, by changing the rights and obligations of the parties which were decreed by that original judgment.

Nonjudicial branches of government are empowered to do things that have the "practical effect" of changing rights and obligations originally decreed by judgments of federal courts. A Presidential pardon (U.S. Const., Art. II, § 2, cl. 1) has an obvious "practical effect" of changing such obligations. This change is extremely significant; a pardon eliminates all adverse effects of a judgment of conviction, and voids any sentence or civil disability. Ex Parte Garland, 71 U.S. at 380.

Despite this significant "practical effect" on prior federal court judgments, the exercise of the pardon power does not mean the judiciary never validly exercised the Article III judicial power in the first place. Nor does it mean a federal court's prior final judgment is rendered nonexistent. Nor does it mean the Presidential pardon power is unconstitutional. It only means that after a valid exercise of Article III judicial power, another branch of Government did something *it* was constitutionally entitled to do.

The original judgment remains on the books unchanged, for whatever rights and obligations it still requires (whether or not there are any).

Similarly, if a federal court were to interpret a treaty in a manner that the Executive Branch and its treaty partner believed was inappropriate, the Executive and its partner would be empowered to negotiate an agreement repudiating the federal court interpretation, as long as it was not independently unconstitutional on other grounds. That does not mean the federal court did not exercise Article III jurisdiction in the first place, or that its exercise of Article III jurisdiction and final judgment became nullities *post hoc*. It means that after a valid exercise of Article III jurisdiction, another branch of government can do anything that is a proper exercise of *its* Constitutional powers, even if it has the "practical effect" of changing (even nullifying) rights and obligations originally decreed by a judgment. Again, the original judgment must remain intact, and there must be no other constitutional problem with the nonjudicial branch's action.

So it is with Congress. If a federal court errs in interpreting the will of Congress, then Congress can fix that error, as was discussed in Part I(A) above. If by so doing, Congress changes rights and obligations decreed by a prior federal court judgment, this is still permissible as long as Congress sticks to its constitutional function of legislation, does nothing to change the prior judgment itself, and violates no other constitutional norms. That does not mean the court never exercised jurisdiction in the first place, or that it did not issue a decree under its Article III powers. It only means Congress can act within its area of legislation in an otherwise constitutional manner, whatever the "practical effect" of its legislation may be. This is what Congress did in section 27A(b).

A judgment and the "practical effect" of a judgment are not the same thing. If nonjudicial review of a judgment is constitutionally forbidden, nonetheless, this Court has never established a doctrine in separation of powers jurisprudence giving constitutional significance to the "practical effect" of a judgment. The Court of Appeals' opinion and respondents' arguments are without support in this Court's opinions.

Had there been any doubt as to whether a "practical effect" doctrine ever existed, it would have been scuttled by this Court's decision in Robertson v. Seattle Audobon Society, ___ U.S. ___, 112 S.Ct. 1407, 118 L.Ed.2d 73 (U.S. March 25, 1992). For in Robertson, the Ninth Circuit's decision was another exposition of the "practical effect" doctrine. The Ninth Circuit held Congress violated the separation of powers

principles of United States v. Klein because the "**clear effect**" of subsection (b)(6)(A) was to perform judicial functions under Article III, by directing the courts to reach a specific result and find certain facts. Seattle Audobon Society v. Robertson, 914 F.2d 1311, 1316 (9th Cir. 1990) (boldface added). This Court rejected the "clear effect" approach, holding instead that Congress simply created a new law through legislation, which it was empowered to do. Robertson v. Seattle Audobon Society, 112 S.Ct. at 1413-14.[10]

Robertson further shows there is no separation of powers issue based on whether a nonjudicial branch has done something which has a "practical effect" on rights and obligations originally decreed by a federal court judgment. Rather, the sole separation of powers issue is whether a nonjudicial branch has exercised judicial powers it is constitutionally unauthorized to exercise; namely, permitting nonjudicial review of or otherwise partaking in a federal court adjudication. The principle particularly applicable to this case is that Congress could not review a judgment (the District Court's original judgment) because that would be an exercise of the "judicial power," and the original judgment must always remain intact. Subject to these vital provisos, the nonjudicial branches can change rights and obligations of parties to the judgment if such an action is not independently unconstitutional on other grounds, which Congress did here.

3. *Sioux Nation* And *Wheeling & Belmont Bridge*

The key difference between Congress authorizing nonjudicial review or modification of a federal court judgment (impermissible), and legislatively changing rights and obligations of litigating parties from those originally decreed by a federal court judgment (permissible if not independently unconstitutional on other grounds), is further shown by other separation of powers cases discussed by the Court of Appeals: United States v. Sioux Nation of Indians, 448 U.S. 371 (1980), and Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1836).

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[10] Even this Court's interpretations of the Constitution are not completely final in terms of their "practical effect." For if this Court interprets the Constitution in a manner that is considered objectionable, the Constitution provides for the ultimate remedy—amend the Constitution. That the Constitution can be amended to change the "practical effect" of decisions of this Court does not mean the Court never exercised jurisdiction in the first place, or the Legislatures of 38 states acted unconstitutionally in ratifying the amendment.

The Court of Appeals distinguished Sioux Nation and Wheeling & Belmont Bridge by asserting "exceptions" to its "practical effect" interpretation of the separation of powers. Sioux Nation, it was said, was distinguishable from this case because it involved "public rights" and not "private rights." Plaut v. Spendthrift Farm, 1 F.3d at 1498. Wheeling & Belmont Bridge was distinguished from this case on the ground that it involved injunctive relief and not legal relief. Plaut, 1 F.3d at 1494-95.

The constitutional doctrine of separation of powers does not have to be a general rule of thumb punctuated by *ad hoc* exceptions for "public rights," "equitable relief," and whatever else might seem appropriate at a given moment. The guiding principles established by our Framers are much simpler and universally applicable: The Legislature can exercise the legislative power; it cannot exercise the judicial power; and its legislation cannot be "independently unconstitutional on other grounds."

Thus, in Sioux Nation, Congress eliminated the "practical effect" of the prior final judgments by an Act that maintained those judgments intact, and was independently constitutional because it emanated from Congress's power to pay the Nation's debts. Id., 448 U.S. at 397-401. In Wheeling & Belmont Bridge, Congress eliminated the "practical effect" of the prior final judgment by an Act that maintained that judgment intact, and was independently constitutional because it emanated from Congress's power to regulate interstate commerce. Id., 59 U.S. at 431. And so in this case, Congress eliminated the "practical effect" of the prior final judgment by an Act that maintained that judgment intact, and was independently constitutional for the reasons set forth in Part I above—namely, the retrospective legislation did not deprive any party of private property rights or otherwise violate any party's right to due process of law.

More particularly, in Sioux Nation, this Court considered a "practical effect" objection essentially identical to that here. "The objection would take the form that Congress, in directing the Court of Claims to reach the merits of the Black Hills claim, ***effectively*** *reviewed and reversed that Court's 1975 judgment* that the claim was barred by res judicata, *or its 1942 judgment* that the claim was not cognizable under the Fifth Amendment." Id., 448 U.S. at 392 (boldface and italics added).

This Court held that when Congress enacted the 1978 Act, it "neither brought into question the finality of that court's [the Court of Claims'] earlier judgments, nor interfered with that court's judicial function in deciding the merits of the claim." United States v. Sioux Nation, 448

U.S. at 406-07. In other words, in Sioux Nation, the Act of Congress did not affect either the 1942 judgment or the 1975 judgment; it did not address those judgments at all. As a result, there was no separation of powers problem, whatever the Act's "practical effect."

While the Act of Congress would still have been prohibited had it been "independently unconstitutional on other grounds," it was not; that was the importance of Congress's constitutional power to pay the Nation's debts. Congress was thus empowered to waive the *res judicata* effect of any prior judgment and provide for a new litigation, so long as it did not attempt to review the prior judgments or affect the judiciary's ability to exercise fully the "judicial power" in the new litigation, neither of which it did. Accord Pope v. United States, 323 U.S. 1, 9-12 (1944).

The inapplicability of the "practical effect" doctrine was also shown in an early Court of Claims cited by this Court in Sioux Nation, Nock v. United States, 2 Ct. Cl. 451 (1867). Nock further shows the important difference between a judgment and the "practical effect" of a judgment. This Court's discussion of Nock illustrates the principles relevant here:

> In Nock, the Court of Claims was confronted with the precise question whether Congress invaded judicial power when it enacted a joint resolution, 14 Stat. 608, directing that court to decide a damages claim against the United States "in accordance with the principles of equity and justice," even though the merits of the claim previously had been resolved in the Government's favor. The court rejected the Government's argument that the joint resolution was unconstitutional as an exercise of "judicial powers" because it had the ***effect*** *of setting aside the court's prior judgment*. Rather, the court concluded:
>
> > "It is unquestionable, that the Constitution has invested Congress with no judicial powers; it cannot be doubted that a legislative direction to a court to find a judgment in a certain way would be little less than a judgment rendered directly by Congress. But here Congress do not attempt to award judgment, nor to grant a new trial judicially; neither have they reversed a decree of this court; nor

> attempted in any way to interfere with the administration of justice. Congress are here to all intents and purposes the defendants, and as such they come into court through this resolution and say that they will not plead the former trial in bar, nor interpose the legal objection which defeated a recovery before." 2 Ct.Cl., at 457-458 (emphasis in original).

> The Nock court thus expressly rejected the applicability of separation-of-powers objections to a congressional decision to waive the res judicata effect of a judgment in the Government's favor.

United States v. Sioux Nation, 448 U.S. at 398 (boldface and italics added). Nock states very clearly the difference between a judgment and the "practical effect" of a judgment, for separation of powers purposes.

A similar analysis applies to Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856). In that case, Congress did not purport to affect the first judgment rendered after the initial decision by this Court. Id., 59 U.S. at 431. Congress did, however, nullify the "practical effect" of that judgment by legislatively decreeing that the bridge which this Court had held to be an obstruction of commerce was actually not an obstruction of commerce "in contemplation of law." Id. at 431.

This Court held the Act valid, since it was independently constitutional on other grounds. It was within Congress's power over the public right of navigation—part of the commerce power—to determine "what shall or shall not be deemed in judgment of law an obstruction to navigation." Id. This Court also distinguished a hypothetical money judgment: "Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court." Id. But that was not the situation in Wheeling & Belmont Bridge, and it is not the situation here.

C. Further Analysis And Conclusion

It is understandable that the Court of Appeals mistakenly equated modifying a final judgment (impermissible under the separation of powers),

with modifying the rights and obligations decreed by a final judgment (permissible if not independently unconstitutional on other grounds).

In most cases that are adjudicated to conclusion, especially cases involving private parties and final money judgments, the two modifications are equally impermissible. But that is not because there is any separation of powers problem with the latter modification. Rather, it is because the latter modification will be independently unconstitutional on other grounds; the Due Process Clause will protect the winning litigant from impairment of the private property rights decreed by the final judgment on the merits. This is nothing more than the "vested rights" argument addressed in Part I of this brief, applied correctly to final judgments on the merits.

Thus, the Court of Appeals was correct in stating that Congress could not "vacate[], reverse[], or otherwise disturb[]" a final judgment for a million dollars. Plaut, 1 F.3d at 1495. A judgment for a million dollars does "reassign property rights as necessary to satisfy the law." Id. Even if Congress does not vacate or reverse the judgment, it is still barred by the Due Process Clause from disturbing its effect in that situation—from reassigning the property rights already assigned by the valid judgment.

But not all judicial judgments "reassign property rights." For example, judgments on mere procedural grounds and not on the merits may only announce the court's refusal to hear a dispute. Such judgments are not *res judicata* and can be relitigated. No property rights are created by those judgments, as discussed in Part I above. The separation of powers would still bar Congress from passing a statute stating that such a judgment is vacated and void. However, neither Article III of the Constitution nor the Due Process Clause bars Congress from eliminating the procedural time bar and providing a forum for hearing the underlying claim on the merits.

The practical ramifications of these principles are fairly intuitive. They would include:

— If plaintiff P brought an action in federal court which was dismissed for failure to pay a filing fee, and Congress then passed legislation retroactively waiving the filing fee for plaintiffs in P's class, it would hardly be questioned that the defendant did not acquire permanent immunity based on the initial dismissal, and P could refile his action. Furthermore, if Congress passes a statute stating that actions which are dismissed for failure to pay a filing fee may be reinstated upon payment of the proper fee, the defendant also acquires no immunity from the original dismissal, and the statute is constitutional.

— If plaintiff X brought an action in federal court which was dismissed for want of jurisdiction because the jurisdictional statute momentarily lapsed through operation of a "sunset law," and Congress immediately thereafter reenacted the jurisdictional statute and X refiled his lawsuit, the federal courts would have jurisdiction to hear the claim on the merits. Compare Freeborn v. Smith, 69 U.S. (2 Wall.) 160, 174-76 (1865).

— Nation A, with which the United States is at war, sues a private party for breach of a prewar contract. The District Court enters judgment dismissing A's action, since A cannot sue in a federal court. See Ex Parte Colonna, 314 U.S. 510 (1942). Subsequently, a new head of state takes power, the war ends, and Congress provides that the federal courts have jurisdiction to hear A's claims. A can then refile. Compare Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380 (1829).

To sum up, Congress can grant jurisdiction and change substantive law, even if there has been a prior judicial decree. Any such prior decree must remain intact and must be respected for whatever rights and obligations (if any) it still requires. If Congress does that, its legislation conforms to the separation of powers, whatever its "practical effect." The legislation is then valid unless it is "independently unconstitutional on other grounds." Section 27A(b) conforms to these principles, and as is discussed in Part I above, it has no other constitutional infirmity.

Based on the foregoing, section 27A(b) does not violate the constitutional separation of powers.[11]

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[11] In the view of *amicus curiae*, there is another important reason why section 27A(b) does not violate the separation of powers. Because it involves an area that has not yet been well explored by the courts, however, it is relegated to a textual footnote.

It is normally within the purview of Congress to legislate. U.S. Const., Art. I, § 1. "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*." Federalist 47, quoted in Plaut v. Spendthrift Farm, 1 F.3d at 1491 (emphasis in original).

However, the very nature of this Court's decision in Lampf was to act in a manner customary to a Legislature, by engaging in pure lawmaking. Time bars, after all, are called *statutes* of limitation. This Court has acknowledged that any statute of limitations is a creature of policy-making and legislation. Chase Securities Corp. v. Donaldson, 325 U.S. at 314; Campbell v. Holt, 109 U.S. at 628. In Lampf, this Court candidly recognized that it was engaging in "interstitial lawmaking" based on "federal policies . . . and the practicalities of litigation." Id., 111 S.Ct. at 2778 (quoting Reed v. United Transportation Union, 488 U.S. 319, 324 (1989)). Indeed, the Framers of our Constitution would probably have recognized creation of new statutes of limitation as solely an Article I power, since courts sitting at law were not in the business of creating new time bars in 1787.

There is nothing wrong with judicial legislation of itself. This Court has used the term "interstitial federal lawmaking" in describing judicial legislation to fill statutory gaps. United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973); see Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). Many decisions involving statutes of limitation for federal actions have been products of interstitial judicial lawmaking. See DelCostello v. International Brd. of Teamsters, 462 U.S. 151 (1983); Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987); United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973); Holmberg v. Armbrecht, 327 U.S. 392 (1946).

However, given that Lampf is pure judicial legislation, the argument against section 27A(b) seems to be that the judiciary acts competently under Article III by legislating a statute of limitations, an Article I power, but then Congress acts incompetently under Article I and violates the separation of powers by fixing an error in the judiciary's use of this Article I power. That makes little sense. It might instead be suggested that if any branch has wandered into the realm of another branch, it is the judiciary that has trespassed against the Legislature; by contrast, the Legislature has only legislated. If Congress violates Article III by exercising the "judicial power," then arguably the judiciary violates Article III by exercising the "legislative power." Even if not, Congress should not be held to violate any separation of powers by amending legislation with more legislation.

While amicus believes this analysis is correct, he recognizes that the area of judicial legislation has not been well explored insofar as it pertains to the relations between the judiciary and Congress. As a result, he has not taken up much space with this discussion, but rather has focused this Part on arguments from Hayburn's Case. Nonetheless, the whole

(continued...)

III. A New Statute Of Limitations Depriving A Hearing For Parties Whose Claims Were Timely When Filed Violates The Due Process Clause, And Congress Violates No Constitutional Laws By Overriding Such A Constitutionally Infirm Time Bar

Amicus curiae has addressed the arguments commonly made in cases attacking the constitutionality of section 27A(b). In the view of *amicus*, however, there is a simpler reason why section 27A(b) violates no constitutional laws: The District Court's dismissal of this case *itself* violated the right to a hearing under the Due Process Clause, by barring claims that were timely when filed. Providing a hearing that was denied in deprivation of fundamental due process cannot violate the Constitution.

The procedural posture of this argument is unusual, for it requires this Court to recognize the District Court's retroactive application of the new Lampf time bar was unconstitutional. Nonetheless, this Court has never squarely addressed the constitutionality of applying Lampf retroactively to bar claims that were timely when filed. See Lampf, 111 S.Ct. at 2786 (O'Connor, J., dissenting).

It should do so now. If the District Court's dismissal of the shareholders' action was unconstitutional, then it would be unnecessary for this Court to decide the constitutionality of section 27A(b), since Congress cannot have violated the Constitution by removing the unconstitutional effects of judicial decisions. "This Court will not pass upon the constitutionality of an act of Congress where the question is properly presented unless such adjudication is unavoidable . . . ." United States v. Hayman, 342 U.S. 205, 223 (1952). Such adjudication is not unavoidable here. Alternatively, since the grant of certiorari addresses two constitutional questions, acceptance of this argument would simply render section 27A(b) constitutional on both grounds.

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[11](...continued)
point of this Court's current retroactivity jurisprudence is to *prevent* judicial legislation, and to implement the views of the late Justice Harlan that decisions of this Court not be "the commands of a super-legislature," Desist v. United States, 394 U.S. 244, 259 (1969) (Harlan, J, dissenting), or based on policy considerations "that are appropriate enough for a legislative body." Mackey v. United States, 401 U.S. 667, 677 (1971) (Harlan, J., concurring in the judgment). Thus, the issue should be worth a further look. Many similar concerns were raised in Justice Stevens's dissent in Lampf, 111 S.Ct. at 2783-85.

A further discussion of "judicial legislation" as it relates to Lampf and the argument in this footnote may be found in "Prospective Application," 24 Pac. L.J. at 375-79.

A number of decisions from this Court make clear that if *Congress* had enacted a new limitations period on June 20, 1991 and applied it retroactively to bar pending claims that had been timely when filed, Congress would have violated a party's right to due process of law by depriving it arbitrarily of a right to be heard in court. A legislature cannot adopt a new, shortened limitations period without at least providing a reasonable period in which affected parties may bring their existing claims.

A typical statement of these principles—among the many by this Court—may be found in Wilson v. Iseminger, 185 U.S. 55 (1902):

> It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the court. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily . . . It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action.

Id. at 62. Wilson was a case in which the legislature did provide a reasonable time after enactment of a new statute for bringing existing causes of action; there have been others as well. See, e.g., Terry v. Anderson, 95 U.S. (5 Otto) 628, 632-33 (1877).

This Court has used the "reasonable time" doctrine to avoid construing new statutes of limitation so as to bar existing claims without any time in which to bring the action. Such a construction was necessary to avoid unconstitutional results:

> When a statute declares generally that no action, or no action of a certain class shall be brought, except within a certain limited time after it shall have accrued, the language of the statute would make it apply to past actions as well as to those arising in the future. But if an action accrued more than the limited time before the statute was passed a literal interpretation of the statute would have the effect of absolutely barring such action at once. **It will be presumed that such was not the intent of the legislature. Such an intent would be unconstitutional.**

Sohn v. Waterson, 84 U.S. (17 Wall.) 596, 599 (1873) (boldface and underlining added). Other decisions of this Court have also construed new

limitations periods to provide for a "reasonable time" in which to maintain existing causes of action. See, e.g., Union Pacific Ry. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 202 (1913); Ochoa v. Hernandez y Morales, 230 U.S. 139, 154, 161-62 (1913).

None of these decisions has ever been overruled, and there is nothing to suggest they are anything other than good law. See Block v. North Dakota, 461 U.S. 273, 286 n.23 (1983); Texaco, Inc. v. Short, 454 U.S. 516, 527 n. 21 (1982).

The Due Process Clause protects against arbitrary action by government. Daniels v. Williams, 474 U.S. 327, 331 (1986) (quoting Hurtado v. California, 110 U.S. 516, 527 (1884)). This means arbitrary action by any branch of government, be it legislative, executive or judicial. See also Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680 (1930) [guarantee of due process extends "to state action through its judicial as well as through its legislative, executive, or administrative branches of government"]; Ownbey v. Morgan, 256 U.S. 94, 110-11 (1929) (same). There are "constitutional limitations on the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." Societe Internationale v. Rogers, 357 U.S. 197, 209 (1958).

Thus, if it is unconstitutional for the legislative branch to implement a defense—such as a statute of limitations—so as to wipe out existing claims arbitrarily, it can be no more constitutional for a nonlegislative branch to implement a defense so as to wipe out existing claims arbitrarily. And the federal judiciary is not exempt from the Due Process Clause. This Court has held that a construction of law in a judicial decision can act as an arbitrary deprivation of a right to be heard, and consequently as a denial of due process of law. Brinkerhoff-Faris Trust v. Hill, 281 U.S. at 679.

Unless cases such as Wilson v. Iseminger are to be repudiated, one can only conclude a judicial decision also violates the Due Process Clause, if it does what those cases held Congress could not do. It violates due process for any branch of government to create a new limitations period without providing for a reasonable time in which to prosecute existing causes of action, or to bar causes of action that were timely when filed. The Due Process Clause does not apply to Congress alone.

Wilson v. Iseminger should be particularly applicable to this case. When the shareholders filed their lawsuit on November 25, 1987, the law uniformly looked to the limitations period of the most analogous forum

state action for section 10(b) claims. See, e.g., Herman & MacLean v. Huddleston, 459 U.S. 375, 383-84 & n.18 (1983); Silverberg v. Thomson McKinnon Securities, Inc., 787 F.2d 1079 (6th Cir. 1986). For section 10(b) claims in federal court in Kentucky, the Kentucky blue sky period applied—three years, which could be tolled by fraudulent concealment. Herm v. Stafford, 663 F.2d 669 (6th Cir. 1981). There was nothing to the contrary in November 1987. But everything started changing on April 8, 1988—4 1/2 months *after* the shareholders filed suit—with the Third Circuit's decision in In re Data Access Systems Securities Litigation, 843 F.2d 1537 (3d Cir. 1988) (en banc), cert. denied, 488 U.S. 849 (1988).

Furthermore, assuming these shareholders could have found a crystal ball to anticipate a later judicial sea change in the limitations period, they would have needed a second crystal ball to anticipate it would be applied retroactively to them. Before their action was filed, well over a century of precedent, culminating in this Court's decision in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), would have operated to foreclose such an argument in a civil case. Even this Court's seminal 1987 decision in the area of criminal retroactivity, Griffith v. Kentucky, 479 U.S. 314 (1987), stated that civil retroactivity "continues to be governed by the standard announced in Chevron Oil Co. v. Huson." Griffith, 479 U.S. at 322 n.8.

Shortly before this action was filed, this Court again decided whether a new statute of limitations would apply retroactively to bar an action that was timely when filed. This Court unanimously held it would not, following Chevron Oil. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 608-09 (1987). Saint Francis College and Chevron Oil were the settled law of retroactivity of new time bars when this case was filed.

A simple application of Wilson v. Iseminger leads to the conclusion that the District Court's deprivation of the shareholders' right to be heard on their federal antifraud claim, based on a new limitations period that "came from nowhere" and instantly barred claims which were timely when filed, violated the shareholders' right to due process as an arbitrary extinguishment of the right to be heard. It does not matter that the source of the due process violation was a federal court of law; the action was a due process violation nonetheless. Many of these points were also made by Justice O'Connor in her Lampf dissent, 111 S.Ct. at 2785-88.

Obviously, neither this Court nor any other federal court would advertently violate the Constitution that its most solemn duties are to interpret and uphold. Nonetheless, the retroactive application of Lampf to

bar claims that were timely when filed was drastic, harsh and manifestly unfair to parties who had no idea of what was coming.

The shareholders were among those parties. The District Court's retroactive application of the new Lampf time bar was an arbitrary and unconstitutional deprivation of their right to be heard on their federal antifraud claim. There can have been no constitutional prohibition against Congress providing a hearing that had been unconstitutionally denied.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Dated this 20th day of July, 1994.

Respectfully submitted,

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(12)

No. 93-1121

IN THE

Supreme Court of the United States

October Term, 1994

ED PLAUT, *et al.*,

Petitioners,

v.

SPENDTHRIFT FARM, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF FOR THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The Washington Legal Foundation hereby moves, pursuant to this Court's Rule 37.4, for leave to file the attached brief *amicus curiae* in support of the respondents. Counsel for respondents and the United States have consented to the filing of this brief; counsel for petitioners Ed Plaut, *et al.*, have refused to provide consent, thereby necessitating the filing of this motion.

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center based in Washington, D.C., with over 100,000 members and supporters nationwide. WLF devotes substantial resources to litigating cases that raise issues of federalism, separation of powers, statutory interpretation, and other constitutional issues. WLF

has appeared before this Court as amicus in numerous cases raising these issues. *See, e.g., United States v. Carlton*, 114 S. Ct. 2018 (1994); *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994); *Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. 2331 (1994); *Davis v. United States*, 114 S. Ct. 2350 (1994).

This case raises important due process, separation of powers, retroactivity, and statutory interpretation questions, the resolution of which will have a greater impact on the public interest than the particular case before the Court. On the one hand, Section 27A of the Securities and Exchange Act of 1934 is addressed only to a discrete set of individuals and is intended to apply only retroactively; as such, Section 27A is a narrow antithesis of a prospective law of general applicability. On the other hand, the fundamental questions posed by this case are not limited to a discrete and transient set of claims arising under the Securities Exchange Act. To the contrary, this case presents a clear opportunity for the Court to address a vital and recurrent constitutional issue, and to provide federal lawmakers with much needed guidance.

WLF brings a broader perspective to these issues and has presented arguments in its brief that complement rather than duplicate those of the respondents. For the foregoing reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the respondents.

Respectfully submitted,

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September 9, 1994

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The interest of *amicus* Washington Legal Foundation is set forth in the motion accompanying this brief.

STATEMENT OF THE CASE

In the interest of judicial economy, *amicus* adopts the Statement of the Case in respondents' brief.

SUMMARY OF ARGUMENT

Respondents argue that 476 of the FDIC Improvement Act of 1991, codified as Section 27A of the Securities and Exchange Act of 1934, 15 U.S.C. § 78aa-1 ("Section 27A"),[1] violates the Separation-of-Powers doctrine and the Due Process Clause of the Fifth Amendment. *Amicus* agrees generally with these arguments, but would argue further that Section 27A violates the core constitutional principle of the Rule of Law as well as at least one additional textual constraint on Congress' legislative powers, namely the *Ex Post Facto* clause in Article I, Section 9,

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[1] Section 27A, in its entirety, provides as follows:

> (a) Effect on Pending Causes of Action. -- The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) Effect on Dismissed Causes of Action. -- Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991 -- (1) which was dismissed as time barred subsequent to June 19, 1991, and (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991, shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

Pub. L. No. 102-242, § 476, 105 Stat. 2236, 2387 (1991) (codified at 15 U.S.C. § 78aa-1).

Clause 3. Moreover and related to these arguments, *amicus* urges the Court to address squarely petitioner's argument that Section 27A should be read literally to avoid the various constitutional issues.

As this Court well knows, Congress continues to revisit judicial decisions -- including both statutory and constitutional decisions of this Court.[2] Each time Congress overturns a judicial decision and provides a remedy beyond that authorized by the Judiciary, the same quandary posed by Section 27A arises; that is, how to deal with individual litigants whose rights have been adjudicated or otherwise resolved during the period between the judicial decision and any congressional reaction thereto.

By directing that courts grant specifically identifiable private litigants relief from any "unfair" results of *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) ("*Lampf*") and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) ("*Beam*"),[3] Section 27A contravenes not only the Separation-of-Powers doctrine and due process, as respondents argue, but also the jurisprudential premise upon which all other judicial functions rest: the Rule of Law. *Amicus* would argue further that it was to protect against just

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[2] One recent study shows that between 1967 and 1990, Congress has overturned no less than 121 different Supreme Court statutory decisions and an additional 220 lower court rulings. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L. J. 331, 424, App. I (1991).

[3] Before Section 27A, the rule announced in *Lampf* had been applied consistently in the lower courts, resulting in the dismissal of a number of highly publicized private securities fraud cases, including those against Michael Milken and Charles Keating. Many Members of Congress apparently thought the application of *Lampf* to plaintiffs in these cases was unfair. *See, e.g.*, 137 Cong. Rec. S17,315 (daily ed. Nov. 21, 1991) (statement of Sen. Riegle) ("We must take steps to protect those investors who had cases pending prior to that decision"); 137 Cong. Rec. H11,812 (daily ed. Nov. 26, 1991) (statement of Rep. Markey) ("shockingly, over $4 billion of fraud claims, including those against Milken, Keating and Fred Carr, are threatened with pending dismissal motions solely as a result of Lampf, and that decision's retroactive application").

such legislative encroachments that the text of the Constitution explicitly prohibits Congress from passing laws *ex post facto*.[4]

To be sure, Congress has the power to "overturn" the Court's statutory rulings by establishing new prospective laws. If Congress disagrees with *Lampf*, for instance, Congress is free to amend the statute (assuming, of course, the amended statute remains within Congress' legislative powers under Article I). Unless and until *Lampf* is overturned, however, Congress does not have the power to instruct the Court to disregard its own ruling, to instruct the lower courts to ignore otherwise determinative rulings of the Court, or to adopt a judicial methodology — in this case borrowing of state statutes of limitations — explicitly rejected by the Court, based upon the Court's definitive interpretation of the intent of the 1934 Congress. These Article III judicial matters are beyond congressional authority under Article I.

Finally, as demonstrated below, Section 27A can and should be read as merely a codification -- not a "reversal" -- of the Court's holdings in *Lampf* and *Beam*. "The laws," as that term is used in Section 27A, can only refer to Congressional enactments, *i.e.* Sections 10(b) and 9(e) of the Securities Exchange Act of 1934, not to varying *misinterpretations* of the 1934 Act by lower federal courts. A literal reading of Section 27A not only avoids difficult constitutional issues but also accords with traditional notions of the relative roles of the federal Judiciary and Legislature, thereby advancing the principle of judicial restraint.

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[4] Section 27A neither alters the 1934 Act's one-year/three-year statute of limitations nor overturns *Lampf*, but "allow[s] the *Lampf* decision to be set aside so there would, in fact, be a legal reachback to cover cases" pending at the time that *Lampf* was decided. 137 Cong. Rec. S17,306 (daily ed. Nov. 21, 1991) (statement of Sen. Riegle); *see Musick, Peeler & Garrett v. Employers Insurance of Wausau*, 113 S. Ct. 2085, 2089 (1993) ("*Musick*") ("Congress did no more than direct the applicable 'limitation period for any private civil action implied under section 78j(b) of this title [§ 10(b) of the 1934 Act] that was commenced on or before June 19, 1991 [the day prior to issuance of *Lampf, Pleva*].' 15 U.S.C. § 78aa-1 (Supp. III).").

ARGUMENT

I. THE CONSTITUTION PROHIBITS RETROACTIVE FEDERAL LEGISLATION PURPORTING TO CHANGE "THE LAW" APPLICABLE TO PENDING OR ALREADY DISMISSED ARTICLE III CASES BETWEEN OR AMONG PRIVATE PARTIES

Article III of the Constitution grants to the courts alone the power to decide "cases" and "controversies," and thus precludes legislative direction to reach specific results in designated cases. Section 27A is the type of purely retroactive law that is repugnant to the United States Constitution. In *Marbury v. Madison*, Chief Justice John Marshall stressed that "[t]he government of the United States has been emphatically termed a government of laws, and not of men." 5 U.S. (1 Cranch) 137, 163 (1803). *Amicus* respectfully suggests that Section 27A, if permitted to stand, would eviscerate not only the reliance individual parties in litigation had placed on this Court's exposition of "the law" in *Lampf*, but also the reliance that all future litigants are rightly entitled to place in any other decisions of this Court.

When addressing challenges to retroactive civil legislation, modern American courts typically resort to a "minimum scrutiny" due process balancing test: "Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches . . . ." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984); *see United States v. Carlton*, 114 S. Ct. 2018, 2022 (1994) (following, *inter alia*, *Pension Benefit Guaranty*). This essentially subjective test provides little guidance as to the outer bounds of Congress' constitutional power to pass retroactive laws affecting private parties in litigation.

Such a test is especially inappropriate when Congress has intruded on a core power of the Judiciary: retroactively affecting the outcomes of Article III cases between or among private parties. At the time of the drafting and ratification of the Constitution, *legal* necessity — as opposed to political expedience — was the only excuse for an exception to the

general rule against retroactive (*i.e.*, *ex post facto*) legislation, whether nominally civil or criminal.[5]

If Congress can retroactively unsettle the effects of *Lampf* and *Beam* vis-à-vis some but not all private parties in pending or already dismissed judicial cases, then Congress can retroactively unsettle the effects of any other decision of the Court -- based merely upon results with which a majority of Members of Congress disapprove.

Although the Sixth Circuit based its decision on the Separation-of-Powers doctrine, relying on *Hayburn's Case*, 2 U.S. (2 Dall.) 408 (1792),[6] that holding necessarily implicates other textual and structural provisions of the Constitution dealing with retroactivity, foremost of which is the federal *Ex Post*

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[5] During the constitutional debate, James (later Justice) Iredell made the following observations about retroactive laws being tolerable only in cases of "invincible necessity":

> *Ex post facto* laws may sometimes be convenient, but that they are ever absolutely necessary I shall take the liberty to doubt, till that necessity can be made apparent. Sure I am, they have been the instrument of some of the grossest acts of tyranny that were ever exercised, and have this never failing consequence, to put the minority in the power of a passionate and unprincipled majority, as to the most sacred things, and the plea of necessity is never wanting where it can be of any avail.

Iredell, *Observations on George Mason's Objections to the Federal Constitution*, in *Pamphlets on the Constitution of the United States: Published During Its Discussion by the People 1787-1788* 333, 368 (P. Ford ed. 1888). Neither the petitioner nor the Solicitor General has pled necessity as a justification for Section 27A -- because there was no "invincible necessity" for the purely legislative suspension of *Lampf* and *Beam*.

[6] *See generally Gordon v. United States*, 117 U.S. 697, 703 (Appendix 1885) (the principle that the Court's judgments cannot be subject to revision by Congress "was decided by this Court as long ago as 1792, in *Hayburn's Case*, 2 Dall. 409, and this decision has even since been regarded as a constitutional law"); *Hurtado v. California*, 110 U.S. 516, 536 (1884) ("due process of law" categorically excludes from legislative power, *inter alia*, "acts reversing judgments, . . . legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation").

Facto clause.[7] *Amicus* urges the Court to address the federal *Ex Post Facto* clause not only on its own merits, but for insight into both the Separation-of-Powers doctrine upon which the Sixth Circuit's decision rests, and respondents' Due Process argument.

A. Unlike the State Legislative Power at Issue in *Calder v. Bull*, Congress' Powers Are Limited to Those Enumerated in the U.S. Constitution

It is still axiomatic in the late Twentieth Century that "[t]he Constitution created a Federal Government of limited powers." *New York v. United States*, 112 S. Ct. 2408, 2417 (1992) (citation omitted). Nevertheless, whether and to what extent Congress has the power to enact retroactive civil laws today does not lend itself to clean constitutional analysis, due to the seminal retroactivity case of *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).[8]

In *Calder v. Bull*, the Court is generally understood to have held that the Constitution's two express prohibitions against *ex post facto* laws only apply to criminal legislation. Consequently, parties in litigation tend to treat the two distinct *ex post facto* prohibitions, applicable to the States and to Congress respectively, as interchangeable. *See, e.g.*, Brief of the United States at 18 n.9 (citing the federal prohibition, Art. I, § 9, Cl. 3, followed by the general proposition that "The Ex Post Facto Clause [is] applicable solely to criminal laws, *Calder v. Bull*, 3

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[7] U.S. Const. art. I, § 9, cl. 3 (restricting Congress); *cf.* U.S. Const. art. I, § 10 (restricting States).

[8] A fundamental yet unaddressed question in this case is this: Where in the Constitution did the States respectively or the people cede power to Congress to change "the law" affecting a limited number of private parties in Article III litigation? *See United States v. Butler*, 297 U.S. 1, 63 (1936) ("The question is not what power the federal government ought to have, but what powers in fact have been given by the people."), *quoted in New York v. United States*, 112 S. Ct. at 2418. Petitioners and the Solicitor General ignore this fundamental question. Instead, they ask this Court to confer upon Congress, in effect, an unlimited power to change certain laws retroactively, even when that change affects the respective rights of private parties in pending or dismissed cases before Article III courts. *Amicus* believes the American people deserve better -- and are entitled to better under *their* Constitution.

U.S. (3 Dall.) at 3 [construing the state prohibition, Art. I, § 10, Cl. 1]").

A close reading of Justice Iredell's and Justice Peterson's separate concurring opinions in *Calder v. Bull*, however, suggests that the holding of the Court would have been different had the legislative power at issue in that case been federal instead of state, as explained more fully below. This case presents an opportunity for the Court to revisit or distinguish *Calder v. Bull*, and to clarify the constitutional limits on Congress to enact legislation affecting private litigants retroactively.

Calder v. Bull involved state legislation that "set aside a decree of the court of Probate for Hartford . . . and granted a new hearing." 3 U.S. (3 Dall.) at 386 (Chase, J.). As was the custom at the time, the Supreme Court delivered the opinions of the various justices *seriatim*. Justice Chase opined that the *ex post facto* prohibition applicable to the Connecticut legislature (Art. I, § 10) applied only to four types of criminal laws. 3 U.S. (3 Dall.) at 390. Justices Paterson and Iredell, in separate concurring opinions, expounded on the "indefinite nature" of the Connecticut Legislature's powers, which at the time included both legislative *and judicial* functions (in stark contrast to the federal Legislature's powers then and now).

The Court's decision in *Calder v. Bull* is thus not controlling precedent in a case involving the federal legislature, which unlike the legislative power at issue in *Calder v. Bull*, is constrained not only by explicit due process and *ex post facto* restrictions, but also by other organic, structural, and textual constitutional constraints on the exercise of federal legislative power. Likewise, this case is not controlled by *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), in which an intervening treaty between the United States and France affected the disposition of a captured warship that a lower court had condemned as "prize." In *Schooner Peggy*, Chief Justice Marshall himself distinguished "private cases between individuals" (Section 27A cases) from "great national concerns where individual rights acquired by war are sacrificed for national purposes" (*Schooner Peggy*). 5 U.S. (1 Cranch) at 110.[9]

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[9] During oral arguments last April in *Morgan Stanley & Co. v. Pacific Mutual Life Insurance Co.* (No. 93-609), counsel for the United States conceded that the Government's arguments for sustaining Section

(continued...)

Accordingly, this case should be treated as a case of first impression both under the Separation-of-Powers doctrine as applied to private litigants, and under other structural and textual indicia of the intent of the framers and ratifiers of the United States Constitution vis-à-vis retroactive legislation affecting private litigants, including the Rule of Law, the procedural Due Process clause, and the federal *Ex Post Facto* clause.

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[9](...continued)
27A are based on caselaw distinguishable from the Section 27A context:

> Justice Scalia: Mr. Dreeben, does the Government have any case other than Sioux Nation in -- in which Congress has done this -- set aside an extant judgment [between or among private litigants]?
>
> Mr. Dreeben: Well, the other cases that -- that were the ones that Sioux Nation relied on, which are also cases in which the Government was --
>
> Justice Scalia: No case, in -- in which a private party was a party to the judgment, has Congress ever tried to set it aside?
>
> Mr. Dreeben: I am not sure that there is no case. But we rely -- we don't rely --
>
> Justice Scalia: But you don't know of any?
>
> Mr. Dreeben: No. We don't rely on any precedent of this Court that says that.

Official Transcript at 49.

Amicus has searched in vain for any decisions of this Court involving an Article III judgment between or among private parties where Congress has sought to "set aside an extant judgment" -- aside from, of course, *Morgan Stanley*, in which the Court reached a 4-4 vote split on Section 27A's constitutionality (Justice O'Connor taking no part in the decision).

B. The Constitution Restricts the Power of Congress to Enact Retroactive Legislation Like Section 27A

1. Retroactive legislation affecting pending or dismissed cases between or among private litigants violates the Rule of Law underpinnings of the Constitution.

Earlier this Century, the classical liberal scholar Friedrich von Hayek described the Rule of Law, with its inherent restriction on retroactive legislation, as the single most distinguishing factor of a free society: "Rule of Law . . . means that the government in all its actions is bound by rules fixed and announced beforehand -- rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge." F. von Hayek, *The Road to Serfdom* 72 (1944).[10]

That a general prohibition against retroactive lawmaking is deeply rooted in Anglo/American jurisprudence cannot be disputed. Blackstone argued that "laws should not be enforced before the subjects have an opportunity to become acquainted with them." Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775, 777 (1936). James Madison justified restrictions on retroactive laws in the United States Constitution on the grounds that such restrictions "will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society." *The Federalist* No. 44, at 128-29 (R. Fairfield 2d ed. 1966).

Other contemporaneous legal authorities who influenced the framers and ratifiers of the United States Constitution agreed generally that the type of retroactivity in this case is inherently contrary to the rule of law. For example, Professor Burlamaqui

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[10] *See* S. von Pufendorf, VII *De Jure Naturae et Gentium: Libri Octo* Ch. VI, § 11 (1688) (C.H. & W.A. Oldfather trans. 1934) ("[I]t is clear in what sense is to be taken the statement of the ancient Greek writers on politics and their followers, namely, that the government of a state should be committed to laws rather than to men. For that can have no other fit meaning than this: Care should be taken that those who rule should govern the commonwealth according to the direction of established laws, rather than by their own private and uncircumscribed pleasure." (Citation omitted)).

wrote: "It is necessary that the laws be sufficiently notified to the subject; for how could he regulate his actions and motions by those laws, if he had never any knowledge of them?" J. Burlamaqui, *The Principles of Natural Law* 104 (Nugent trans. 3d ed. 1780); *see* J. Burlamaqui, 2 *The Principles of Natural and Politic Law* 154 (Nugent trans. 3d ed. 1784) ("The establishment of civil society ought to be fixed, so as to make a sure and undoubted provision for the happiness and tranquillity of man. For this purpose it was necessary to establish a constant order, and this could only be done by fixed and determinate laws.").

Amicus respectfully suggests: (1) that these and other historical insights into the inherent injustice of retroactive laws are instructive as to how the framers and ratifiers of the United States Constitution would have viewed Section 27A; and (2) that the inescapable conclusion has to be that Section 27A violates the Rule of Law underpinnings of the Constitution.

2. Section 27A is judicial in nature, and therefore violates the separation-of-powers doctrine.

In *Calder v. Bull*, Justice Iredell suggested that the Connecticut legislature's exercise of *judicial* power in the form of purely retroactive legislation was "strange," implying that the federal Congress, due to separation-of-powers doctrine principles, could not even countenance the idea:

> It may, indeed, appear strange to some of us, that in any form there should exist a power to grant, with respect to suits depending or adjudged, new rights of trial, new privileges of proceeding, not previously recognized and regulated by positive institutions; but such is the established usage of Connecticut, and it is obviously consistent with the general superintending authority of her Legislature. . . . The power, however, is judicial in its nature; and whenever it is exercised, as in the present instance, it is an exercise of judicial, not of legislative, authority.

3 U.S. (3 Dall.) at 398 (Iredell, J., concurring "in the general result," dissenting in part due to "the reasons that are assigned").

Chancellor Kent of New York, author of *Commentaries on American Law* (9th ed. 1858), while acknowledging the holding

in *Calder v. Bull* in *Dash v. Van Kleeck*, expounded on the judicial nature of retroactive legislation:

> It is equally inadmissible to consider [a legislative] act as declaring how the former statutes were to be *construed*, as to cases already existing. If this interpretation was to be considered as giving the former acts a new meaning, it then becomes a new rule, and is to have the same effect, as any other newly created statute. But if it be considered as an exposition of the former acts for the information and government of the courts in the decision of causes before them, it would then be taking cognisance of a judicial question. This could not *possibly* have been the meaning of the act, for the power that makes is not the power to construe a law. It is a well settled axiom that the union of these two powers is tyranny. . . . Our government . . . consists of departments, and contains a marked separation of the legislative and judicial powers. . . . [T]he right to interpret laws does, and ought to belong exclusively to the courts of justice.

7 Johns. 477, 508-09 (N.Y. Sup. Ct. 1811) (emphasis in original).

Professor Story later justified the result in *Calder v. Bull* on grounds clearly distinguishable from federal legislation: "There is nothing in the Constitution of the United States which forbids a State legislature from exercising judicial functions; nor from divesting rights vested by law in an individual, provided its effect be not to impair the obligation of a contract." J. Story, 2 *Commentaries on the Constitution of the United States* 272 (5th ed. 1891).

Justice Scalia more recently opined that retroactivity, while appropriate for judicial decisions, is constitutionally problematic for legislation generally: "[I]t is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases." *Harper v. Virginia Dep't of Taxation*, 113 S.

Ct. at 2510 (Scalia, J., concurring) (quoting T. Cooley, *Constitutional Limitations* 91 (1868)).[11]

To the extent Section 27A is what its sponsors purport, *i.e.*, a purely retroactive compromise addressing only pending and dismissed cases, Section 27A is judicial in nature and therefore outside the scope of Congress' legislative powers.

3. The Solicitor General's Misconstruction of *Beam* And *Seattle Audubon* Would Create a Conflict Between Those Cases and the Separation-of-Powers Doctrine.

The Solicitor General not only fails to appreciate the serious separation of powers issues discussed above; he has misconstrued this Court's decision in *Robertson v. Seattle Audubon Soc.*, 112 S. Ct. 1407 (1992) ("*Seattle Audubon*"), so as to validate virtually any congressional command which takes a legislative form, but even suggested that the judicial retroactivity principles set forth in *Beam* are subject to suspension (and presumably even eradication) by Congress.[12] Taken together, these misconstructions of recent High Court rulings create a serious conflict with traditional separation of powers jurisprudence.

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[11] *See* Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 Ky. L.J. 323, 327-33 (1993) (discussing historical bases for *ex post facto* restrictions vis-à-vis separation of powers); *see generally* Laycock, *Due Process and Separation of Powers: The Effort to Make the Due Process Clauses Nonjusticiable*, 60 Tex. L. Rev. 875, 878 (1982) ("the due process clauses look to legislatures only for substantive entitlements, and . . . the clauses commit minimum procedural rights to the Constitution and therefore to the Court"), *citing* Michelman, *Formal and Associational Aims in Procedural Due Process*, in Nomos XVIII: Due Process 126, 133-34, 158-59 n.27 (J.R. Pennock and J. Chapman eds. 1977).

[12] On page 13 of the Brief for the United States, the Solicitor General cites *Seattle Audubon* for the proposition that "Congress exercised its 'legislative powers' by passing a law, in response to *Lampf*, that prescribed a new rule of decision to be applied by the courts." At page 20 (in footnote 12), the Solicitor General suggests that the Court in *Seattle Audubon* held "that when Congress 'amend[s] applicable law,' its action does not implicate the principles underlying *Klein*."

Some lower courts mistakenly have found that *Seattle Audubon* controls this case, even though the Court in *Seattle Audubon* merely applied the proposition (inapposite here) that once Congress makes a change in the underlying law following a lower court decision, appellate courts may apply the altered law to pending cases. 112 S. Ct. at 1407; *cf. Schooner Peggy*, 5 U.S. (1 Cranch) at 103 (an intervening treaty affected the disposition of a captured warship that a lower court had condemned as "prize"). The Court resolved *Seattle Audubon* by holding that Congress indeed had made substantive prospective changes in the underlying statute, *see* 112 S. Ct. at 1413 ("subsection (b)(6)(A) compelled changes in law, not findings or results under old law"), 1414 (provision in question affected pending case "by effectively modifying the provisions at issue in those cases"), which changes properly were applied to pending cases.

It does not follow, however, that when Congress makes absolutely no prospective change in the provisions of the underlying statute -- as is true with Section 27A -- it remains free to enact a purely retroactive statute requiring that the courts ignore an otherwise determinative Supreme Court interpretation of that statute. Under the reasoning in *Seattle Audubon*, the substantive law which should be applied to this case, and to all implied private actions under the 1934 Act, is exactly the same; there is no "new law" to be applied to any 1934 Act case, as none of the underlying statutory provisions in the 1934 Act have been changed. Congress has no authority to legislate retroactive exceptions to the application of the laws of the United States, even if it has the power to alter those laws prospectively.[13]

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[13] This follows as well from the basic proposition that this Court is the final arbiter of the intent of a previous Congress, and its decisions resolve, once and for all, the meaning of a statute at the time of its decision. *See, e.g., United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 34 (1982); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 354 n.39 (1977); *see also United Air Lines, Inc. v. McMann*, 434 U.S. 192, 200 n.7 (1977) ("[l]egislative observations 10 years after the passage of the Act are in no sense part of the legislative history").

Congress has no authority to insist that an erroneous construction of prior law (in this case, circuit law disavowed in *Lampf* as inconsistent with the intent of the 73rd Congress, *see Musick*, 113 S. Ct. at 2089-90) be applied to pending cases, much less to revivify

(continued...)

The lower courts that have sustained Section 27A have eschewed this common sense reading of *Seattle Audubon* in favor of construing that case to validate "an act of Congress that is intended to affect litigation *so long as it changes the underlying substantive law in any detectable way.*"[14] If this approach is correct, then *Seattle Audubon* -- a decision which did not purport to resolve separation of powers issues, 112 S. Ct. at 1414 -- has tacitly overruled all of this Court's separation of powers jurisprudence and has rendered *United States v. Klein* a dead letter. Yet *Seattle Audubon* does not overrule *Klein*, either explicitly or implicitly. The Court in *Seattle Audubon* never intimated or held that Congress could enter directly into the judicial sphere at all, much less by dictating that the courts resolve any case on the basis of counterfactual assumptions.

The only construction of *Seattle Audubon* faithful to traditional separation of powers jurisprudence is that Congress does not make a change in the underlying substantive law simply because it couches a command in statutory guise, regardless of whether that rule of law requires reversal of a judgment of this Court or an invasion of core judicial functions. The lower courts' form over substance reading of *Seattle Audubon* is unfaithful to separation of powers doctrine, which clearly condemns legislative attempts to act as a "super-Supreme Court" and exercise judicial functions in legislative guise.[15]

The lower courts similarly have misconstrued *Beam* in almost conscious disregard of separation of powers principles. For example, several appellate courts have reasoned that *Beam*

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[13](...continued)
cases that already have been dismissed, or that may have been settled, on the basis of this Court's definitive construction of the law. *See also Beam*, 501 U.S. at 542 (Souter, J., joined by Stevens, J.) (quoting *Federated Department Stores v. Moitie*, 452 U.S. 394, 410 (1981)) (addressing finality concern raised by relitigation of issues).

[14] *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1570 (9th Cir. 1993) (emphasis added).

[15] *See Hurtado*, 110 U.S. at 535-36 ("It is not every act, legislative in form, that is law. . . . It must be not a special rule for . . . a particular case. . . thus excluding, as not due process of law, . . . acts reversing judgments . . . legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the form of legislation.").

is not constitutionally based and therefore is subject to suspension by the legislature.[16] This analysis ignores the underlying separation of powers issue, which is whether *Beam's* judicial retroactivity principles are matters within the exclusive purview of the judiciary. The several opinions in *Beam* reflect "that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally,"[17] inherent in "basic norms of constitutional adjudication,"[18] mandated by "the Constitution."[19] *Beam's* rejection of selective prospectivity derives "from the integrity of judicial review, which does not justify applying principles determined to be wrong to litigants who are in or may still come to court." 501 U.S. at 547 (Blackmun, J., joined by Marshall, J. and Scalia, J.); *see Harper*, 113 S. Ct. at 2517.

Beam establishes that, in our constitutional scheme, the judiciary has the exclusive responsibility for deciding under what circumstances judicial decisions shall be applied to litigants already in the judicial system. This power cannot constitutionally be exercised by Congress, regardless of whether any particular judicial rule for making these decisions is "constitutionally based." *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (essential

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[16] *Anixter v. Home-Stake Production Co.*, 977 F.2d 1533, 1547 (10th Cir. 1002); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1458 n.3 (7th Cir. 1992); *First Winthrop Corp.*, 989 F.2d at 1572. *Contra Harper*, 113 S. Ct. at 2517 ("Mindful of the 'basic norms of constitutional adjudication' that animated our view of retroactivity in the criminal context, [*Griffith v. Kentucky*, 479 U.S. 314, 322 (1987)], we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases.").

[17] *Beam*, 501 U.S. at 537 (Souter, J., joined by Stevens, J.).

[18] *Beam*, 501 U.S. at 547 (Blackmun, J., joined by Marshall, J. and Scalia, J.).

[19] *Beam*, 501 U.S. at 548 (Scalia, J., joined by Marshall, J. and Blackmun, J.).

attributes of Article III powers must remain in the courts).[20] Even temporary legislative suspension of these judicial rules invades Article III and exceeds the authority of Congress under Article I.

If the lower courts are correct, then Congress can overturn rather than suspend *Beam*, ordering the courts -- including this Court -- to continue to utilize the *Chevron* test (or any other test devised by Congress) in order to determine whether to apply existing precedent to litigants within the judicial system. *But see Harper*, 113 S. Ct. at 2512 n.9 (rejecting *Chevron Oil* analysis as an inappropriate method for determining choice of law to be applied in the federal courts). Determining whether to apply one rule of law or another to parties in litigation is an essential attribute of deciding Article III "cases" and "controversies." Regardless of whether *Beam* is based on the Constitution *per se*, it thus resolves a question within the exclusive authority of the judiciary, which constitutionally is not subject to revision by the Congress.

Absent prompt clarification by the Court, lower court misconstruction of these important recent rulings will continue and the separation of powers doctrine as enunciated by the Court throughout its history will cease to exist.[21]

4. Federal legislative power does not extend between Congresses.

Article 1, Section 1 vests all "legislative powers . . . in a Congress of the United States, which shall consist of a Senate and a House of Representatives." Every two years a new Congress is formed, and this Court has observed that the views

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[20] For example, the Constitution surely does not require that the courts read briefs submitted by litigants. Yet even so, Congress surely cannot pass a law forbidding the courts from reading briefs at all, or from reading briefs submitted by certain litigants (*e.g.*, those whose names begin in the latter half of the alphabet) or in a certain class of cases (*e.g.*, defendants in civil rights cases). These are matters within the scope of Article III authority, as are the judicial retroactivity rules established by *Beam*.

[21] *Cf. Harper*, 113 S. Ct. at 2523 (Scalia, J., concurring) ("The critics of the traditional rule of full retroactivity were well aware that it was grounded in what one of them contemptuously called 'another fiction known as the Separation of Powers.'" (citation omitted)).

Congress is formed, and this Court has observed that the views of one Congress about the intent of a prior enacting Congress are entitled to little deference. *See Vogel Fertilizer*, 455 U.S. at 34; *Teamsters*, 431 U.S. at 354 n. 39; *see also McMann*, 434 U.S. at 200 n.7.

In 1934 the 73rd Congress enacted section 10(b) of the Securities and Exchange Act. Almost 60 years later, the 101st Congress enacted Section 27A, which purported to clarify "the law" prior to *Lampf* and *Beam*. But one Congress cannot definitely speak for the intent of another, for such would be an usurpation of judicial power. *Cf. Beam*, 501 U.S. at 549 (Scalia, J., joined by Marshall and Blackmun, JJ.) (discussing judicial retroactivity vis-à-vis the division of federal powers).

The limitation in Article I, Section 1 of "all legislative power" to "a Congress" suggests that the legislative power does not extend between Congresses. Accordingly, once a Congress has adjourned, that Congress' intent cannot be reconsidered by a subsequent Congress, especially as to cases and controversies wherein individuals have relied upon a law enacted by the prior Congress. As Chief Justice Marshall admonished in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), "if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power." 10 U.S. (6 Cranch) at 135 (discussing contract clause restrictions on state governments).

Because the case against Spendthrift Farms, et al. was dismissed under the Securities and Exchange Act of 1934, as enacted by the 73rd Congress, Section 27A enacted by the 101st Congress "cannot undo it." 10 U.S. (6 Cranch) at 135.

II. TEXTUAL INDICIA SHOULD BE CONSTRUED BROADLY FOR A GOVERNMENT OF LIMITED POWERS

To the extent a power to enact retroactive legislation turns on presumptions (such as the presumption that the founders intended the term "*ex post facto*" to apply only to criminal statutes), any such presumptions should take into consideration the fundamentally different natures of state versus federal

governmental powers in the United States.[22] As the Court clarified in *Butler*:

> Each state has all governmental powers save such as the people, by their Constitution, have conferred upon the United States, denied to the states, or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably to be implied from those granted. In this respect we differ radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body subject to no restrictions except the discretion of its members.

297 U.S. at 63.

The power of Congress to change laws affecting private parties in litigation is neither enumerated nor "reasonably to be implied from those granted." 297 U.S. at 63. Neither the petitioner nor the Solicitor General has suggested an enumerated power of Congress upon which the power to enact Section 27A was based -- because there is none.[23] Likewise, neither

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[22] *See* T. Cooley, *Constitutional Limitations* 173 (1868) ("The government of the United States is one of *enumerated* powers; the governments of the States are possessed of all the general powers of legislation. When a law of Congress is assailed as void, we look in the national Constitution to see if the grant of specified powers is broad enough to embrace it; but when a State law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the Constitution of the United States or of the State we are able to discover that it is prohibited. . . . Congress can pass no laws but such as the Constitution authorizes either expressly or by clear implication; while the State legislature has jurisdiction of all subjects on which its legislation is not prohibited."). Accordingly, a state government may be presumed to have a power to enact retroactive civil laws while the federal government is presumed not to have such power.

[23] Petitioner's conclusory statement that "Congress enacted Section 27A(b) in a valid exercise of the enumerated power to regulate interstate commerce" (Petitioner's Brief at 26) is just that -- conclusory. Likewise, the Solicitor General only insinuates that Section 27A was (or could have been) enacted "pursuant to its power (continued...)

petitioner nor the Solicitor General has suggested that the power to reopen dismissed Article III "cases or controversies" between or among private parties is "reasonably implied from those granted" -- because it's not.

A. Section 27A Violates Procedural Due Process.

The Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The "guaranty of due process" protects individuals from "unreasonable, arbitrary or capricious" governmental regulation of commercial matters. *Nebbia v. New York*, 291 U.S. 502, 525 (1934). Purely retroactive legislation affecting private parties in pending or dismissed litigation is antithetical to the rule of law and therefore should be *per se* "unreasonable, arbitrary or capricious" as a matter of procedural due process. As Justice Powell emphasized in *Mathews v. Eldridge*, 424 U.S. 319 (1976), "[t]he essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" 424 U.S. at 348 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)). Retroactive legislation like Section 27A provides neither notice nor an opportunity "to meet it."

The procedural nature of constraints on retroactive lawmaking, whether criminal or civil, is made clear by Blackstone's 1765 exposition on "The Nature of Laws in General," wherein he discusses the several properties of "municipal or civil law," as distinguished from "the law of nature, the revealed law, and the law of nations":

> [Municipal or civil law] is likewise "a rule *prescribed*." Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which

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[23](...continued)
to establish inferior federal courts (Art. I, § 8, Cl. 9) and the Necessary and Proper Clause (Art. I, § 8, Cl. 18)." Brief of the United States at 24.

this notification is to be made, is matter of very great indifference. . . . Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them up upon high pillars, the more effectively to ensnare the people. There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when *after* an action is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it; here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence *in futuro*, and be notified before their commencement; which is implied in the term "*prescribed*."

W. Blackstone, 1 *Commentaries on the Laws of England* 45-46 (1765) (emphasis in original).[24]

Because this case presents a *procedural* conflict between private rights and expectations on the one hand and the federal government's desire to penalize certain defendants on the other, it fits squarely within the "principal function of the Due Process Clause." *McGautha v. California*, 402 U.S. 183, 254 (1971) (Brennan, J., dissenting, joined by Douglas and Marshall, JJ.) ("The principal function of the Due Process Clause is to ensure that state power is exercised only pursuant to procedures

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[24] *See Dash v. Van Kleeck*, 7 Johns. at 495 (Thompson, J.) ("After referring to the unjust and iniquitous practice of the *Roman* emperor, (*Caligula*), as to the manner of writing and publishing his laws, [Blackstone] observes, that there is still a *more unreasonable* method than this, which is called making laws *ex post facto*. Although, technically speaking, the term *ex post facto* may be applicable only to laws punishing criminal offenses, the principle is equally applicable to civil cases." (Emphasis in original)); *see generally Reno v. Flores*, 113 S. Ct. 1439, 1455 (1993) (O'Connor, J., concurring) ("procedural due process protections" include "notice of charges").

adequate to vindicate individual rights."), *vacated sub nom. Crampton v. Ohio*, 408 U.S. 941 (1972).[25] If ever there was a fundamental civil right, albeit procedural, that is both "deeply rooted in this Nation's history and tradition," *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (Powell, J.), and "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), it is the right to be free from retroactive governmental deprivations of a recognized right, such as the retroactive revival of a cause of action that has been judicially dismissed, whether or not an appeal can still be, or has been, filed.

B. Section 27A Violates the Federal *Ex Post Facto* Clause.

Article I, section 9 of the U.S. Constitution, concerning restraints on Congress, states that "[n]o Bill of Attainder or *ex post facto* Law shall be passed." In a similar manner, article I, section 10 states that "[n]o State shall . . . pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts." Practically all of this Court's caselaw examining and construing the term "*ex post facto*" involves the latter clause (regarding States), and not the former (regarding Congress). *See Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (Rehnquist, C.J., reviewing the litany of cases since *Calder v. Bull* that have restricted the term "to penal statutes which disadvantage the offender affected by them"). The Court's few cases involving the federal *ex post facto* prohibition typically cite *Calder v. Bull* (construing the state *ex post facto* prohibition) or other authorities stemming therefrom.[26]

The Court apparently has never before been faced with a federal *ex post facto* case that hearkened back to the distinguishing factors expounded by Justices Iredell and Paterson

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[25] *Cf. United States v. Carlton*, 114 S. Ct. at 2027 ("the Due Process Clause guarantees *no* substantive rights, but only (as it says) process") (Scalia, J., concurring in the judgment).

[26] *See, e.g., Kaiser Aluminum & Chemical Co. v. Bonjorno*, 494 U.S. 827, 855-56 (1990) (Scalia, J., concurring); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594-95 (Jackson, J.), *reh'g denied*, 343 U.S. 936 (1952); *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (Taft, C.J.); *Johannessen v. United States*, 225 U.S. 227, 242 (1912) (Pitney, J.).

in *Calder v. Bull*, discussed more fully *infra*. The Court's caselaw, however, has never fully closed the door on the obvious distinctions between federal and state *ex post facto* restrictions. For instance, Chief Justice Rehnquist's opinion in *Collins* suggests, at least implicitly, that the restrictive interpretation stemming from *Calder v. Bull* is limited to the state *ex post facto* clause. *See* 497 U.S. at 41 n.2 ("the Court has consistently adhered to the view expressed by Justices Chase, Paterson, and Iredell in *Calder* that the *Ex Post Facto* Clause [singular] applies only to penal statutes.").

In any case, while the contexts of the respective *ex post facto* prohibitions are quite distinguishable (see discussion of structural indicia, *infra*), they both evince a firm belief that legislative retroactivity -- which results in the unsettling of established rights and/or expectations -- is inherently pernicious. Confirming this belief, James Madison wrote that "*ex-post-facto* laws, and laws impairing the obligation of contracts are contrary to the first principles of the social compact, and to every principle of sound legislation." *The Federalist* No. 44 at 128. The Congressional Research Service recognizes the historical legitimacy of arguments that the *ex post facto* clauses should apply to all legislation: "At the time the Constitution was adopted, many persons understood the terms *ex post facto* laws to 'embrace all retrospective laws, or laws governing or controlling past transactions, whether . . . of a civil or a criminal nature.'" Congressional Research Service, *The Constitution of the United States: Analysis and Interpretation*, S. Doc. No. 16, 99th Cong., 1st. Sess. 381-82 (1987) (quoting 3 J. Story, *Commentaries on the Constitution of the United States* § 1339 (Boston: 1833)).

Supporting the then-popular sentiment that retroactive criminal and civil laws were seen in the same light, the New Hampshire Constitution of 1784 warns that "[r]etroactive laws are highly injurious, oppressive, and unjust. No such law, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." N.H. Const. of 1784, Part 1, § 23.

It is clear from the writings of Thomas Jefferson that the framers' abhorrence of *ex post facto* laws applied to all federal laws, whether civil or criminal. In 1813, for example (even after *Calder v. Bull*), Jefferson wrote of the retroactive application of a congressional patent law:

> Every man should be protected in his lawful acts, and be certain that no *ex post facto* law shall punish or endamage him for them. . . . The sentiment that *ex post facto* laws are against natural right, is so strong in the United States, that few, if any, of the State constitutions have failed to proscribe them. . . . [T]hey are equally unjust in civil as in criminal cases, and the omission of a caution which would have been right, does not justify the doing of what is wrong.

T. Jefferson, Letter to Isaac McPherson, Aug. 13, 1813, in 8 *The Writings of Thomas Jefferson* 326-27 (A. Bergh ed. 1903).

Likewise, Chancellor Kent of New York, while acknowledging the holding in *Calder v. Bull*, wrote that "there is no distinction in principle, nor any recognized in practice, between a law punishing a person criminally, for a past innocent act, or punishing him civilly by divesting him of a lawfully acquired right. The distinction consists only in the degree of the oppression, and history teaches us that the government which can deliberately violate the one right soon ceases to regard the other." *Dash v. Van Kleeck*, 7 Johns. at 506; *and see* 7 Johns. at 503-04 (referring to intentionally retroactive laws as "pernicious" and "repugnant to common justice").

Notwithstanding *Calder v. Bull* and its legal progeny, a number of prominent jurists and scholars in this Century have insisted that the *ex post facto* clauses should apply in the civil context. *See, e.g., Lehmann v. United States ex rel. Carson*, 353 U.S. 685, 690 (Black and Douglas, JJ., concurring in the result), *reh'g denied*, 354 U.S. 944 (1957); *Marcello v. Bonds*, 349 U.S. 302, 319 (Douglas, J., dissenting), *reh'g denied*, 350 U.S. 856 (1955); *see generally* Crosskey, *The True Meaning of the Constitutional Prohibition of Ex-Post-Facto Laws*, 14 Chi. L. Rev. 539 (1947) (citing original historical sources); P. Kurland & R. Lerner, 3 The Founder's Constitution 343-54 (eds. 1987) (quoting, *inter alia*, Justice Johnson's Note to *Satterlee v. Mathewson*, 2 Pet. 380 (1829)).

In a few cases since *Calder v. Bull*, the Court has even suggested that certain new civil laws, if applied retroactively, could be *per se* unconstitutional. For example, in *Herrick v. Boquillas Land & Cattle Co.*, 200 U.S. 96 (1906), this Court affirmed the Arizona Supreme Court's analysis that "if construed as absolutely barring causes of action existing at the time of its passage [a new statute of limitation] was unconstitutional." 200 U.S. at 102 (agreeing with Arizona

Supreme Court, citing *Sohn v. Waterson*, 84 U.S. (17 Wall.) 596 (1873)). In 1927 this Court struck down a retroactive application of a federal estate tax as unconstitutional. *Nichols v. Coolidge*, 274 U.S. 531 (1927). Other cases have held that retroactively-imposed laws can be "confiscation of property in violation of due process of law." Smead, *supra*, 20 Minn. L. Rev. at 796 (reviewing other cases; citations omitted).

Amicus believes that retroactive legislation affecting pending litigation between or among private litigants, especially as applied to completed transactions — as this and other Section 10(b) cases are — is inherently unreasonable. More importantly, the due process and *ex post facto* clauses, together with contemporaneous historical indicia, demonstrate that the framers and ratifiers of the United States Constitution shared this belief.

III. SECTION 27A CAN AND SHOULD BE READ AS A CODIFICATION — NOT A "REVERSAL" — OF THE COURT'S HOLDINGS IN *LAMPF* AND *BEAM*

In considering Section 27A in the context of cases pending when the Court decided *Lampf* and *Beam*, regardless of whether a case "was dismissed as time barred subsequent to June 19, 1991" (Section 27A(b)), the proper focus is the statutory provision declaring that the applicable statute of limitations shall be "the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991."[27] A fundamental question of construction in any Section 27A case, therefore, is whether the "*law* applicable in the jurisdiction" should be read to mean (1) pre-*Lampf* judicial interpretations *and misinterpretations* of the 1934 Act's statute of limitations, *or* (2) the Securities Exchange Act of 1934 and laws involved in *Beam*, as first articulated by several lower federal courts and dispositively construed by the Supreme Court in *Lampf* and *Beam*.[28] The

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[27] Both Section 27A(a) and Section 27A(b) contain this identical language.

[28] Even before *Lampf*, several lower federal courts had recognized that a "1 and 3 year" statute of limitations should be applied uniformly to claims premised on Section 10(b). *See, e.g., In re Data Access*

(continued...)

answer to this question is dictated by several recognized rules of statutory construction, and several fundamental truisms regarding the nature of the federal judicial system.

Amicus suggests that, in construing Section 27A, the Court inevitably must take one of the following awkward positions vis-à-vis petitioner's argument that Section 27A can be read literally to avoid constitutional issues: (1) that Section 27A's language should be read non-literally (but consistent with legislative history), thereby forcing the Court to address serious constitutional issues relating to the effect of such a non-literal reading on both litigants and the judiciary itself; or (2) that Section 27A's language should be read literally (but inconsistent with legislative history), thereby avoiding the constitutional issues but at the same time reading the text of Section 27A as at odds with the available non-textual evidence of legislative "intent."[29] If the Court does not address this issue, it implicitly takes the first position, thereby acquiescing to the fallacy that *Lampf* made statutory "law." *Amicus* urges the Court at least to address respondents' literal construction argument squarely.

A. Text, Not Legislative History, Controls the Meaning of Section 27A

Section 27A, when subjected to recognized rules of statutory construction, does not require courts to address the complex constitutional issues relating to retroactivity, separation-of-powers doctrine, etc. Many of the reported Section 27A cases fail to recognize this point because they adopt the view that Congress "intended" Section 27A to "undo" or "reverse" the Court's holdings in *Lampf* and *Beam* -- a view based primarily upon floor statements inserted into the record

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[28] (...continued)
Systems Sec. Litigation, 843 F.2d 1537 (3d Cir.), *cert. denied*, 488 U.S. 849 (1988); *Short v. Belleville Shoe Manufacturing Co.*, 908 F.2d 1385 (7th Cir. 1990), cert. denied, 501 U.S. 1250 (1991).

[29] *See Plaut v. Spendthrift Farm*, 1 F.3d at 1500 ("Courts are under a duty to impose a saving interpretation of an otherwise unconstitutional statute so long as it is 'fairly possible to interpret the statute in a manner that renders it constitutionally valid.'", *quoting Robertson v. Seattle Audubon*) (Kieth, J., concurring in part and dissenting in part).

by several legislators.[30] The United States has presumptively adopted this position in the numerous intervenor briefs it has filed.

Notwithstanding petitioners' and the Government's assumption that floor statements control the meaning of Section 27A, in other contexts substantial questions have been raised regarding the utility of such statements in divining legislative "intent." As one United States Senator recently explained:

> It is very common for Members of the Senate to try to affect the way in which a court will interpret a statute by putting things into the Congressional Record. . . . [W]hatever is said on the floor of the Senate about a bill is the view of a Senator who is saying it . . . . [A] court would be well advised to take with a large grain of salt floor debate and statements placed into the Congressional Record which purport to create an interpretation for the legislation that is before us.

137 Cong. Rec. S15,325 (daily ed. Oct. 29, 1991) (statement of Sen. Danforth); *see Hirschey v. FERC*, 777 F.2d 1, 7 n.1 (D.C. Cir. 1985) (Scalia, J. concurring).

Although legislative history may appear to offer "clear" evidence of Congressional intent, it is recognized that the resultant statutory text may "simply fail[] to give effect to that intention." *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 790 (1981) (Stevens, J. concurring). Similarly, the fact that a federal statute may have unintended effects "is no reason why the courts should refuse to enforce it according to its terms, if within the constitutional authority of Congress. Such considerations are more appropriately addressed to the legislative branch of the government, which alone had authority to enact and may, if it sees fit, amend the law." *Caminetti v. United States*, 242 U.S. 470, 490-1 (1917).

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[30] *See, e.g., Maio v. Advanced Filtration Sys., Ltd.*, 795 F. Supp. 1364 (E.D. Pa. 1992) (quoting floor statement of Rep. Markey, "a principal champion of § 27A"), *appeal denied*, 993 F.2d 878 (3d Cir. 1993).

B. The Text of Section 27A Does Not Require Blind Acquiescence to the Fallacy that *Lampf* Made Statutory "Law"

The lower federal courts, and the numerous United States intervenor briefs by implication, have presumed that in Section 27A Congress meant "the laws" to mean the then-existing interpretations *or misinterpretations* of the Securities Exchange Act of 1934 within the various federal judicial circuits. This presumption is *not* required by statutory language, nor is it mandated by the rule of construction that "[i]f a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity," *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892), as both literal and non-literal readings of 27A lead to arguably absurd results -- hence the dilemma: on the one hand, a literal reading would likely frustrate certain legislative and administrative sponsors of Section 27A; on the other hand, the currently unchallenged presumption, implicitly adopted by lower courts and the Department of Justice, contorts the role of the Judiciary under Article III.

Under the principles recognized in *Marbury v. Madison*, 5 U.S. (1 Cranch) at 137, "[i]t is emphatically the province and duty of the judicial department to say what the law is," while it is the role of Congress to make federal laws.[31] Thus, as one district court considering Section 27A has noted:

> As explained in *Beam*, the *Lampf* Court was not making law, but rather, was "'finding it' — discerning what the law is, rather than decreeing today what it is today *changed to*, or what it will *tomorrow* be." *Beam*, [501 U.S. at 549] (Scalia, J., concurring) (emphasis in original). The limitations period "found" in *Lampf* thus did not represent a change in the law, but rather, a mere clarification what the law has always been. Courts such as the Fifth Circuit, which had previously applied other limitations periods to section 10(b) claims, had thus done so in error.

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[31] In contrast with state courts of general jurisdiction which might be said to "make" common law, federal courts are empowered only to interpret and apply the Constitution, treaties and laws of the federal government and are constrained to apply state rules of decision in diversity cases.

TGX Corp. v. Simmons, 786 F. Supp. 587, 592 (E.D. La. 1992). In fact, there was nothing "new" about the Supreme Court's construction of the Securities Exchange Act in *Lampf*, because some lower courts had reached the same result. *See, e.g., Data Access*, 843 F.2d at 1537; *Short*, 908 F.2d at 1385. The "laws," as that word is used in Section 27A, should be construed as a term of art with a specific meaning in the context of the tripartite federal system. When Section 27A is read with such broader structural principles in mind, the statute merely codifies the Court's holdings in *Lampf* and *Beam*.

In Section 27A, Congress explicitly referred to "the laws" as regarding "[t]he limitation period for any private civil action implied under Section 10(b)." There can be but one Congressional intent behind the Securities Exchange Act of 1934 with respect to "[t]he limitation period," and *Lampf* has definitively interpreted that intent. *Lampf*, 501 U.S. at 359 ("In a case such as this, we are faced with the awkward task of discerning the limitations period that Congress intended courts to apply to a cause of action it really never knew existed. Fortunately, however, the drafters of § 10(b) have provided guidance.").

Congress could have used the words "various judicial interpretations of the laws" instead of "the laws" in Section 27A, but it did not. The plain language Congress chose in Section 27A thus leads to only one constitutionally acceptable conclusion: Congress intended "the laws" to mean *its* laws; and the Supreme Court has held that these laws have *always* required a uniform federal statute of limitation, regardless of any prior misinterpretation by federal district and circuit courts.[32]

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[32] The decisions of those lower courts that have ignored the literal construction issue, such as the Eleventh Circuit panel majority's opinion in *Henderson v. Scientific-Atlanta*, 971 F.2d 1567 (11th Cir. 1992), *cert. denied*, 114 S.Ct. 95 (1993), betray a fundamental misunderstanding of bedrock constitutional principles concerning the relative roles of the legislature and the judiciary. The Eleventh Circuit majority opinion in *Henderson*, for example, states that "it must be presumed that Congress was aware of the law as it existed in all the circuits"; yet "the law" embodied in federal statutes (such as statutes of limitation) is by nature national and uniform, not something created in each federal judicial circuit.

C. Rules of Statutory Construction Dictate a Literal Reading of Section 27A to Avoid Unnecessary Constitutional Issues

Two canons of statutory construction militate against reading the statutory reference to the applicable "laws" as referring to the varying interpretations and misinterpretations given the 1934 Act in the lower federal courts.

First, if Section 27A's reference to the applicable "laws" means the varying interpretations and misinterpretations given the 1934 Act in the lower federal courts, Section 27A in effect established diverse limitations periods which applied retroactively, but not prospectively. As the Supreme Court has noted, however:

> Retroactivity is not favored in the law. Thus, Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.

Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988); *see Kaiser Aluminum & Chemical Corp.*, 494 U.S. at 842 (citing and discussing longstanding Supreme Court authority for "the clear rule of construction" that "legislation is to be applied only prospectively unless Congress specifies otherwise"); *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1505 (1994) ("If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.").

Second, to the extent Section 27A is viewed as retroactive and designed to "reverse" *Lampf* and *Beam*, this interpretation of Section 27A gives rise to serious constitutional separation-of-powers doctrine issues, discussed *supra* and more extensively by petitioner. Such an interpretation should not be favored because, if possible, statutes are to be construed to avoid possible conflict with the Constitution. *See Morrison v. Olson*,487 U.S. 654, 682 (1988); *Communications Workers of America v. Beck*, 487 U.S. 735 (1988); *cf.* Comment, *Supreme Court Interpretation of Statutes to Avoid Constitutional Decisions*, 53 Colum. L. Rev. 633 (1953).

In deference to these rules of statutory construction, Section 27A's reference to the "laws applicable in the jurisdiction . . . on June 19, 1991" can and should be understood to mean the "laws" as expounded by the Supreme Court in *Lampf* and *Beam*.

When so read, Section 27A stands as a codification, rather than an abrogation, of *Lampf* and *Beam*.

CONCLUSION

Amicus urges the Court either to affirm the Sixth Circuit's separation-of-powers doctrine holding, and in so doing to provide a "bright line" constitutional test, or to hold, based on a literal interpretation of the language in Section 27A, that Section 27A is merely a codification of *Lampf* and *Beam*.

Respectfully submitted,

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